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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN
and
HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT HAWN.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINIONS BELOW.

The opinion of the District Court is reported in 99 F. Supp. 226. A supplemental opinion is reported in 100 F. Supp. 338. The opinion of the Court of Appeals is reported in 198 F. (2d) 800.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1) and 2101 (c) of Title 28, U. S. Code.

STATEMENT OF THE CASE.

The petitioner's statement of the case adequately presents the facts.

SUMMARY OF ARGUMENT.

First Question—The Effect of Hawn's Contributory Negligence.

It is respondent's position that where a federal court, exercising jurisdiction in maritime affairs, is called upon to adjudicate a claim of maritime origin, to which is annexed as an inseparable incident the right to recover irrespective of contributory negligence, the law to be applied is the admiralty rule of comparative negligence, and not the common-law rule of contributory negligence under which recovery would be completely barred.

It is the basic tenet of respondent's position that our dual system of government cannot successfully function unless the coordinate systems of law which it engenders are permitted to operate in harmony and without serious conflict, and that this can be achieved only by maintaining the proper distribution of judicial power between state and federal courts. This fundamental philosophy runs through the entire body of judicial decision in this field of the law. Expressed in broad terms it means the supremacy of state law in the field of rights deriving solely from the states, and correspondingly, the supremacy of federal law in the field of federally-created rights, irrespective of the forum which is utilized for their determination. Just as in the *Erie R. Co. v. Tompkins* (304 U. S. 64, 82 L. Ed. 1188) line of decisions this Court irrevocably established the supremacy of state law in federal courts adjudicating state-created rights, so has this Court in an unbroken line of decisions established the supremacy of the maritime law, irrespective of the forum. *Panama R. Co. v. Johnson*, 264 U. S. 375; *Garrett v. Moore-McCormack Co.*, 317 U. S. 239; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372; *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424; *Robins Dry Dock*

& Repair Co. v. Dahl, 266 U. S. 449; *Seas Shipping Company v. Sieracki*, 328 U. S. 85.

Nor is this established doctrine in any way affected by the decision of this Court in *Caldarola v. Eckert*, 332 U. S. 155, upon which the petitioner relies. That case was not concerned with the question of state law versus maritime law at all. It turned solely on the right of a state court to decline to entertain a federal claim, under the authority of the decision of this Court in *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377. *Nothing decided or intimated in Caldarola lends the slightest support to the contention that a federal court exercising jurisdiction over maritime matters, when called upon to enforce the same claim, must likewise refuse to entertain it, or that it must look to state law for the governing rules of liability.* The most recent decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, irrevocably establishes the contrary. In that case, *initiated in a federal diversity Court*, the problem presented was the existence and extent of contribution between joint tort feasors in a maritime non-collision case. This Court determined that no such right existed *under the maritime law*, and in deciding the question not only ignored the state law and the result that would have been reached in the state court, but in no sense considered itself bound by state law.

As an alternative to its position on state versus maritime law, petitioner contends that *even under the maritime law*, Hawn's contributory negligence must bar recovery. The argument is predicated on the assumption that the comparative negligence rule does not exist in definitive form in the admiralty, and that even if it does it encompasses a tri-partite rule of loss distribution where, as here, three parties have been found to be at fault; that since under the decision of this Court in *Halcyon, supra*, the right of contribution does not exist as between Pope & Talbot and Haenn, the loss sustained by Haenn cannot be distributed among all the parties at fault; and that inas-

much as under the Halcyon principle this Court cannot formulate such a tri-partite rule, the common-law rule of contributory negligence must be applied.

The answer to this contention is that there is in fact an established rule of comparative negligence in admiralty. *The Arizona v. Anelich*, 298 U. S. 110; *Beadle v. Spencer*, 298 U. S. 124; *Socony-Vacuum Oil Co. v. Smith, supra*, 305 U. S. 424. Furthermore, the assumption is wholly unwarranted that the comparative negligence rule, either in conception or in its evolution, envisions a comprehensive loss-distribution scheme, and that unless all parties are saddled with a share of the loss, its application is anomalous and foreclosed. There is a total and complete absence of authority, either in the literature or in the decided cases, which would lend the slightest support to the suggestion, here made for the first time in this case, that the rule is in any sense or to any degree integrated into the rights of contribution which may or may not exist as between joint tortfeasors.

Finally, as to the effect of the *Halcyon* decision, petitioner overlooks one vital fact, namely, that established rules exist in admiralty for the complete disposition of the rights and liabilities of all of the parties to this litigation. For whatever the measure of Hawn's recovery might be against Pope & Talbot under the maritime rule, *it does not bar recovery altogether: The Max Morris*, 137 U. S. 1; *The Arizona v. Anelich, supra; Beadle v. Spencer, supra; Socony-Vacuum Oil Co. v. Smith, supra.* And so far as Pope & Talbot's rights against Haenn are concerned, Halcyon establishes that no right of contribution exists. So that in no event is this Court faced with the problem, presented in Halcyon, of fashioning new rules hitherto unknown to the maritime law.

Finally, Congress cannot here, as in Halcyon, furnish the solution to the present problem. *For so long as Hawn's contributory negligence does not bar recovery, some rule*

of apportionment must be applied **even if it must now for the first time be formulated. This Court cannot await Congressional action before determining wha. rule of apportionment is to be applied.**

Second Question—May Hawn's Judgment Be Reduced by the Amount of "Compensation" Payments Made by His Employer Haenn?

Petitioner views the question as one involving indemnity between Haenn and Pope & Talbot. No such question is presented in this case. The payments made by Haenn were not compensation payments required under the Harborworkers' Act. In view of Hawn's election to proceed against Pope & Talbot, under Section 933 (a), they were purely voluntary, made in consideration of Hawn's promise to repay out of any sums recovered from petitioner. As a matter of fact, since the judgment exceeds the limit of compensation liability under the Act, Haenn could not, at any time, have been liable for the payment of any compensation whatsoever: Section 933 (f). There is absolutely nothing in the provisions of that Act, or in the policy underlying its purposes, which would justify striking down the agreement between Hawn and Haenn. Under these circumstances, it would be unconscionable to foreclose Haenn from recovering what is in effect nothing more nor less than a loan, made in good faith, by reducing Hawn's judgment as suggested by petitioner.

Third Question—The Application of the Doctrine of Unseaworthiness.

It is Hawn's position that this question is moot, since the judgment below rests upon findings of both negligence and unseaworthiness, and petitioner does not here attack the finding of negligence.

Over and beyond this, we do not believe that the doctrine enunciated by this Court in *Seas Shipping Company*

***v. Sieracki*, 328 U. S. 85, can validly be narrowed to exclude from its scope a longshore worker in Hawn's status. The distinction sought to be drawn between Hawn and Sieracki is untenable.**

Finally, there is not the slightest warrant for *overruling Sieracki*, as the petitioner now for the first time in its present brief contends.

Argument.

FIRST QUESTION: HAWN'S CONTRIBUTORY NEGLIGENCE DOES NOT BAR RECOVERY OF DAMAGES: IN A MARITIME CAUSE OF ACTION BROUGHT IN A FEDERAL COURT EXERCISING JURISDICTION IN MARITIME AFFAIRS THE COMPARATIVE NEGLIGENCE RULE IS APPLICABLE WHETHER THE ACTION IS PROSECUTED IN ADMIRALTY OR AT LAW.

(A) In a Maritime Cause of Action, All of the Substantive Admiralty Rules Apply, Irrespective of the Forum.

The subject matter of the present suit is a maritime tort, *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208. It seeks to enforce a right created and sanctioned by the maritime law and cognizable in admiralty through a common law remedy, i. e., a civil action with trial by jury, "saved" under Section 9 of the Judiciary Act of 1789 (Old Title 28 U. S. C. A. Secs. 41, 371, repealed and re-enacted in substantially similar form in present Title 28 U. S. C. A. Sec. 1333). The question squarely raised for decision is whether, in a maritime cause of action brought on the civil side of the federal district court[1] plaintiff's contributory negligence bars recovery according to the course of the common law, or merely serves to mitigate damages under the principles of the general maritime

1. In our view it is not decisive for present purposes whether jurisdiction here is considered as based upon diversity of citizenship only, or is considered as "arising under the Constitution or laws of the United States". Compare *Jardine v. Walling*, 185 F. 2d 662 (C. A. 3) with *Doucette v. Vincent*, 194 F. 2d 834 (C. A. 1). For the sake of avoiding entanglement in this problem, the present discussion will be cast in terms of diversity jurisdiction, although this hypothesis is probably less favorable to the plaintiff.

law. The answer to this question is of the utmost consequence, for it cuts to the roots of a problem which, unless clearly understood and correctly resolved, can seriously impair the proper balance between the national and state governments, a balance sought to be crystallized and preserved throughout the past one hundred seventy years of judicial and legislative history. As this Court recently pointed out in *Garrett v. Moore-McCormack Co.*, 317 U. S. 238, 245, 87 L. Ed. 239, 243, it has been the constant objective of our legislation and jurisprudence to assure litigants full protection *for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.*

Because of the unique structure of our dual form of government, avoidance of entanglement between state and federal law has been a difficult task. The initial sharp conflict between the Federalists and States-righters which attended the division of powers into two co-ordinate systems has survived to the present day, although with diminishing intensity. It is, therefore, understandable that a major preoccupation of both legislators and the judiciary has been directed toward isolating the respective spheres in which state and federal law must be mutually exclusive.

It is the basic tenet of plaintiff's position that a dual system of government, such as ours, cannot successfully function unless the co-ordinate systems of laws which it engenders are permitted to operate side by side in harmony and without serious conflict, and that such harmony can be achieved only by maintaining the proper distribution of judicial power between state and federal courts and by recognizing the distinct spheres in which these respective systems of laws are to operate to the mutual exclusion of each other. This fundamental philosophy runs through the entire body of judicial decisions in this field of the law; expressed in broad terms it means the supremacy of state law in the field of state-created rights, and, correspondingly, the supremacy of federal law in the field of federally-

created rights, irrespective of the forum which is utilized for their determination.

The maritime law is, under the Constitution, the law of the United States, and not the law of the several states; therefore, rights arising under the maritime law fall into the sphere of federally-created rights: *Panama R. Co. v. Johnson,* 264 U. S. 375, 385-386, 68 L. Ed. 748, 752. The history of the Constitution and of the Judiciary Act of 1789 demonstrates that strong pressures were exerted by the states-righters to secure for the common law courts of the states the widest possible jurisdiction, even in the field of federally-created rights. A research scholar has expressed the view that no part of the federal jurisdiction sustained so strong an attack from the Anti-Federalists as the grant of diversity jurisdiction to the federal judiciary by the Constitution.[2] The effect of these pressures manifested itself in numerous provisions of the Judiciary Act, two of which bear directly upon the present problem. The first is the "saving to suitors" clause (Section 9 of the Judiciary Act of 1789, *supra,* present Title 28 U. S. C. Sec. 1333) which gave the district courts original and exclusive jurisdiction "of all civil causes of admiralty and maritime jurisdiction, *saving to suitors in all cases the right of a common law remedy where the common law is competent to give it . . .*" The second is Section 34 of the Judiciary Act of 1789, which is commonly referred to as the Rules of Decision Act (old Title 28 U. S. C. Sec. 725, present Sec. 1752). This section was framed to allay the fears of the Anti-Federalists, who were apprehensive of encroachment upon state law by the federal diversity courts. It provided as follows:

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2. Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789" (1923) 37 Harvard L. Rev. 49, 81. This piece of research was to be largely responsible for the landmark decision in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, to be discussed later.

> "The laws of the several States, *except where the Constitution, treaties or statutes of the United States otherwise require or provide* shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

These two sections of the Judiciary Act laid the conditions which made it possible to entangle state and federal law, for it enabled state courts to adjudicate federally-created rights, and federal courts to adjudicate state-created rights. Other statutes, later enacted (such as the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, 56) which gave to the state courts concurrent jurisdiction to adjudicate diverse federally-created rights, merely broadened the potentialities for confusion. Perhaps nothing so clearly demonstrates the judicial struggle with the problem of establishing and maintaining a proper balance between the state and federal governments as the parallel courses taken respectively by the Rules of Decision Act and the "saving to suitors" clause through the adjudications of this Court. Because of the broad scope of the subject, it will be treated here only in its most immediate application.

(1) Despite the underlying policy which requires state law in its substantive aspects to be applied in diversity cases involving state-created rights, this Court, for a period of some one hundred years beginning with *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865 (1842), laboring under basic misconceptions, followed the theory that under the Rules of Decision Act the federal courts, in diversity cases involving state-created rights, are required to apply the *statutory* local law only, and are not required to follow the unwritten law of the states; that there is a body of federal common law, not necessarily conforming to the laws of any state, which the federal courts are free to apply in such cases. The defects, both political and social, revealed by the continued application of this doctrine for close to a century,

coupled with new light thrown upon the history of the Judiciary Act of 1789 by the researches of Charles Warren (*supra,* footnote 2) impelled this Court in 1938 to overrule the *Swift v. Tyson* doctrine in *Erie R. Co. v. Tompkins* (*supra,* footnote 2) 304 U. S. 64, 82 L. Ed. 1188, and to re-establish the principle that in all matters involving state-created rights the federal courts exercising jurisdiction in diversity cases must apply as their rules of decision both the common and statutory law of the state in which the cause of action arises.

The full import of this decision was revealed in *Guaranty Trust Company of New York v. York,* 326 U. S. 99, 89 L. Ed. 2079 (1945), where this Court was faced with determining whether in a diversity case, involving an equity proceeding brought to enforce a state-created right, the diversity court was bound by the state statute of limitation. In holding for the application of the state statute this Court, through Mr. Justice Frankfurter said:

> (U. S. p. 101, L. Ed. p. 2082) "Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* . . . embodies. In overruling *Swift v. Tyson,* 16 Pet. (U. S.) 1, 10 L. Ed. 865, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. *It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare.*
>
> . . . . . .
>
> (U. S. pp. 108-109, L. Ed. p. 2086) "*Here we are dealing with a right to recover derived not from the United States but from one of the states.* When, because the plaintiff happens to be a non-resident such a right is enforceable in a federal as in a state court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court *adjudicating a state-created right solely because of the diversity citizenship*

of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can substantially affect the enforcement of the right as given by the State.

"And so the question is not whether a statute of limitation is deemed a matter of 'procedure' in some sense. The question is whether such a statute merely concerns the manner or the means by which a right to recover, as recognized by the State, is enforced or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State court?*

"It is therefore immaterial whether statutes of limitations are characterized as 'substantive' or 'procedural' in State Court opinions in any use of those terms unrelated to the specific issues before us. Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. *It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts.*" (Emphases supplied.)

Without attempting here to undertake a case by case exposition of the host of decisions which have applied the *Erie R. Co. v. Tompkins* doctrine in all of its variegated phases, it may be stated broadly that today the courts are faithfully attempting to adhere to the basic policy behind the Act in observing the line of demarcation between the domains of state and federal law in diversity cases involving state-created rights. The ultimate expressions of this policy are to be found in cases such as *Klingseisen v. Costanzo Transportation Co.*, 101 F. (2d) 902 (C. A. 3). Because brought in an admiralty court, this case was not con

trolled by the Rules of Decision Act. Nevertheless, in that case, involving an action for wrongful death of an occupant of a motor boat, over which the admiralty court assumed jurisdiction because of the locality of the tort, but for which the right of recovery was created by the Pennsylvania death acts,[3] the Court barred recovery because of the contributory negligence of the decedent, applying what it considered to be the Pennsylvania rule of contributory negligence instead of the maritime rule. Thus, the Court here, recognizing that the right which it was called upon to enforce was rooted in state law, disposed of the case upon the common law principles of the state, despite the fact that the cause of action was being asserted in admiralty; and this it did, not because required to do so by the Rules of Decision Act, but in recognition of the policy behind the doctrine of dominance of state law in the field of state-created rights irrespective of the choice of forum. See also *Publicker Commercial Alcohol Co. v. Independent Towing Co.*, 165 F. (2d) 1002, 1004 (C. A. 3).

(2) Turning now to the "saving to suitors" clause of the Judiciary Act, it will be recalled that under Article 3, Section 2 of the Constitution the judicial power of the United States extends to "all cases of admiralty and maritime jurisdiction." This grant of judicial power implicitly establishes the dominance of the maritime law over state law. Nevertheless, there are early adjudications which exhibit something of the same kind of confusion which attended the early interpretations of the Rules of Decision Act. This confusion appears to have a dual origin. In one aspect it is attributable to the same kind of thinking and the same kind of judicial climate which was responsible for the extended sway of the *Swift v. Tyson* doctrine. In its second aspect it is chargeable to a more subtle and less readily discernible error to which the immediate inquiry

3. As will presently appear, the general maritime law does not afford redress for wrongful death.

will be directed. Essentially, the error flows from the circumstance that courts of admiralty, because of certain policy considerations, have undertaken to recognize and enforce a limited species of state-created rights for which the general maritime law affords no redress, but over which the admiralty may properly assume jurisdiction because of the maritime character of the tort. That federal courts recognize state law as *permissibly* applicable in *this* area of maritime activity is no warrant for concluding that they are *bound* to apply state law in other maritime matters. Yet this is the character of the confusion in thinking which has attended the subject in some quarters.

The Courts early recognized that the maritime law is not a complete and perfect system and that, particularly in the field of tort liability for personal injuries resulting in death, there was a considerable hiatus in the admiralty law which left the dependents of a deceased maritime worker without redress, for under the general maritime law there is no right of action for wrongful death. *The Harrisburg,* 119 U. S. 199, 30 L. Ed. 358; *Butler v. Boston & Savannah S. S. Co.,* 130 U. S. 527, 32 L. Ed. 1017. Many of the states had early enacted various versions of Lord Campbell's Act, creating a cause of action for wrongful death, in order to bridge a similar gap in the common law. But Congress had for many years remained silent on the subject with respect to the maritime law, and therefore question early arose whether a state court, proceeding via a common law remedy under the "saving to suitors" clause, possessed the power to enforce a state-created right of action for wrongful death resulting from injury growing out of a maritime tort committed either within its territorial limits, or extra-territorially by one of its citizens, when the maritime law did not afford such relief. In *American Steam Boat Co. v. Chace,* 16 Wall. 522, 21 L. Ed. 369, this Court answered the question in the affirmative, holding (a) that where the maritime law does not provide a right of action for a maritime tort, the fact that admiralty courts

exist and exercise jurisdiction over causes of action, leaves the state courts as free to provide relief in such cases as if the admiralty courts were unknown to our Constitution and had no existence in our jurisprudence, and (b) the fact that the right of action is created by a state statute subsequent to the passage of the Judiciary Act does not foreclose such power in the state courts, for the operation of the "saving" clause is not limited to causes of action known to the common law at the time of the passage of the Judiciary Act . . . that which is "saved" by the Act is a common law remedy and not a *right of action* at common law.[4]

As might have been anticipated, question likewise arose whether an admiralty court would respect the same right, created by state statute, where the matter is properly brought before it for adjudication, as e. g., in a limitation of liability proceeding. For many years the lower federal courts had been in conflict on this question (see discussions in *The Harrisburg, supra,* and *Butler v. Boston & Savannah S. S. Co., supra*). In *Old Dominion Steamship Co. v. Gilmore* (*The Hamilton*), 207 U. S. 398, 52 L. Ed. 264, this Court answered this question likewise in the affirmative,

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4. See *The Moses Taylor*, 4 Wall. (U. S.) 411, 431, where this Court said of the "saving" clause:

> "That clause only saves to suitors 'the right of a common law remedy where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common-law remedy . . . The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim: a remedy is the means employed to enforce a right to redress an injury . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

and thus laid the problem at rest. The decision was placed upon the rationale that where state law creates a personal obligation and imposes a personal liability for conduct within its territorial limits, or upon extraterritorial conduct by its citizens, of such character as might constitutionally be enforced through a common law remedy in the state courts, admiralty will respect and enforce it, in the absence of Congressional action. This doctrine, i. e., the *permissible* application of local law to those maritime subjects of a local character which remain untouched by the maritime law, is now firmly established, subject however, to prescribed limits, namely, that the local law must not conflict with the maritime law, nor work any prejudice to its characteristic features, nor interfere with its proper harmony in its international and interstate relations. In *Just v. Chambers*, 312 U. S. 583, 85 L. Ed. 903, this Court recently thus defined the policy of admiralty in relation to this problem:

> (U. S. p. 387-388, L. Ed. p. 907) ". . . it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the state has established in dealing with a maritime subject. On the contrary there are numerous instances in which the general maritime law has been modified or supplemented by state action, as e. g. in creating liens for repairs or supplies furnished to a vessel in her home port. . . . With respect to maritime torts we have held that the state may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

To summarize the situation, therefore, courts of admiralty have declared, as an expression of judicial policy, that it is desirable to enforce, in admiralty, those species

of "maritime-but-local" state-created rights which do not come into conflict with the maritime law: the judicial power of courts of admiralty, responding to progressive changes in standards of justice may, within certain limits, recognize and enforce a liability which a state has established in dealing with a maritime subject. The course thus pursued is one of choice and not one of compulsion, for there is no constitutional or legislative mandate imposing upon courts of admiralty the duty to enforce such rights. In brief, the admiralty courts have resolved that in the broad interests of justice it is desirable to recognize and enforce those species of state-created rights which have no counterpart in the maritime law and which do not run afoul of constitutional or Congressional sanctions. It is evident from the foregoing considerations that this policy may be utilized only to expand the rights of maritime workers and not to restrict them. For it is only where the maritime law does not afford relief that the states are free to deal with the subject.

But it is a serious error to transmute what is permissible into a positive requirement, and the error is compounded when the attempt is made in a field where this policy can have no possible application (i. e., where the court is dealing with a *maritime* right and not with a *state-created* right of maritime-but-local character) and where, moreover, precisely because the right arises out of the maritime law, governing rules already exist in the admiralty. For in such case the recognition and enforcement of local law, in the face of subsisting maritime law must necessarily lead to a clash between the two, with the resulting subjugation of the latter. In the language of this Court in *Workman v. New York*, 179 U. S. 552, 563, 45 L. Ed. 314, 321: ". . . such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed. . . ."

Two early decisions of this Court appear to have fallen into this kind of error: *Atlee v. Packet Co.*, 88 U. S. 389, 22 L. Ed. 619 and *Belden v. Chase*, 150 U. S. 674, 37 L. Ed. 1218. Both cases subscribe to language, by way of dicta, that although the doctrine in admiralty in collision cases requires an equal division of damages where mutual fault exists, the rule at law will result in a complete denial of recovery. Petitioner concedes that Atlee was dictum, but contends that this was made a rule of decision in *Belden v. Chase*. We believe this is an erroneous view.[5] But whether

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5. In *Belden v. Chase* the owner of the steamboat "Charlotte Vanderbilt" brought an action in the Supreme Court of New York against the owner of the Yacht "Yosemite", claiming that the "Yosemite" was so negligently navigated as to run down and sink the "Vanderbilt". At trial a verdict was rendered in favor of the plaintiff for the full value of the "Vanderbilt", and the judgment was affirmed by the highest court of the state. The case reached the Supreme Court on a writ of error which claimed denial by the state courts, of rights under the federal statutory rules of navigation in two respects: (a) in that the trial judge had erroneously charged the jury with respect to the meaning of the rules insofar as they related to the requirement of carrying certain running lights, as a result of which the "Yosemite" was erroneously found to have been at fault in not carrying range lights under Rule 7, and (b) in that, with respect to the second basis of asserted liability, namely, the charge that the "Yosemite" was negligent in the manner in which it was maneuvered at the time the two vessels were passing, the issue of the "Vanderbilt's" negligence was submitted to the jury under a general charge of negligence without giving any force to the rules of navigation relating to duties and obligations of passing vessels. As to the first claimed error, the Supreme Court held that the "Yosemite" had the necessary lights under Rule 3 and was not governed by the requirements of Rule 7, and that therefore, as a matter of law, she was not at fault in failing to carry range lights. As to the second claimed error, the Supreme Court held that the refusal to give certain requested instructions, taken together with the actual instructions given, resulted in the submission of the

decision or dicta, the views expressed by this Court in these cases may not be ignored. We believe, however, that viewed in retrospect in the light of numerous more recent decisions of this Court the error will become manifest. For rights and obligations arising from maritime collisions are not state-created rights; they are rights rooted in the maritime law. Consequently, the Court was not here dealing with exclusively state-created rights for which no counterpart exists in the maritime law, but with established rights and obligations *arising out of the maritime law.* Since the doctrine of divided damages in collision cases is one of the characteristic features of the maritime law, the application

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issue of the "Yosemite's" negligence without taking into consideration the force of the Rules of Navigation and consequently resulted in the denial of a federal right. The judgment was therefore reversed and the cause remanded for further procedings. It is thus evident that the Court did not, and in the posture of the case before it, could not, undertake to decide the effect of the "Vanderbilt's" contributory negligence, if any, upon plaintiff's right to recover. In point of fact, the defendant attempted to argue that on the plaintiff's own showing the "Vanderbilt" was palpably negligent and that, therefore, defendant's motion for a directed verdict should have been sustained. Of this contention, the Supreme Court said (U. S. p. 700): ". . . *we do not care to pass upon that question,* and content ourselves with indicating certain errors in the rulings of the trial court, which appear to us to so essentially deprive the rules of the force which should have been given them as to amount to a decision against rights claimed under the statute of the United States." It was in one of the introductory paragraphs of the opinion (U. S. p. 691) containing a general discussion of the nature of the action, that the Court remarked, by way of dictum, that although the doctrine in admiralty in collision cases requires an equal division of damages where mutual fault exists, the rule at law is different and requires a complete denial of recovery, citing *Atlee v. Packet Co., supra.*

The Court below concurs in the view that the point under consideration was treated in both cases by way of dicta. R. 239.

of the common law rule of contributory negligence would manifestly subject the maritime law to state domination and would, consequently, fly in the teeth of constitutional sanctions. In brief, the error here made was predicated upon a double misconception: (a) the situation did not involve that area in which the policy of admiralty with respect to maritime-but-local state-created rights is applicable, and (b) even if hypothetically applicable, its application is foreclosed by constitutional prohibitions.

As in the case of the *Swift v. Tyson* doctrine, this Court was inevitably led to perceive, in the light of subsequent experience, that the supposed rule adverted to in *Atlee v. Packet Co.* and *Belden v. Chase* is incompatible with the necessary dominance of the maritime law in our dual system of government. Today the rule is firmly established that when a federal diversity court is called upon to adjudicate *rights arising out of the maritime law*, these rights must be enforced under substantive admiralty principles for in such case the diversity court is not a forum alternative to the state courts enforcing state-created rights. It is a forum alternative to the admiralty courts enforcing maritime rights. In brief, the same fundamental considerations which impelled the Supreme Court in *Erie R. Co. v. Tompkins, supra*, and the long line of cases which have followed in its wake, to overrule the case of *Swift v. Tyson*,[6] and thereby to establish the doctrine of supremacy of state law in the field of state-created rights, inevitably establish the supremacy of federal law (in this instance the maritime law) in the field of federally-created rights. Today this Court consistently applies these principles in

6. "In overruling *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."

Mr. Justice Frankfurter, speaking for the majority in *Guaranty Trust Co. v. York, supra*, at U. S. p. 101.

litigation involving maritime rights, as a review of the more recent leading cases clearly discloses.

Garrett v. Moore-McCormack Co., 317 U. S. 239, 87 L. Ed. 239, involved a suit by a merchant seaman, brought in the Court of Common Pleas of Philadelphia County, for damages resulting from personal injuries, *and for maintenance and cure.* One of the defenses raised was the execution, by the seaman, of a complete release of all claims. After verdict for plaintiff, the court entered judgment for defendant n. o. v. on the ground that plaintiff had failed to sustain the burden of proof required under Pennsylvania law to invalidate the release. Under the Pennsylvania rule, a written release may not be set aside except upon evidence which is "clear, precise and indubitable", whereas under the maritime law the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The Supreme Court of Pennsylvania affirmed the judgment on the theory that the rule as to burden of proof regarding releases does not affect the substantive rights of the parties, but is merely procedural and is therefore controlled by state law. This Court held otherwise, stating:

> (U. S. at p. 245, L. Ed. at pp. 243-244) "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them *by the jurisdiction in which the right itself originates.* Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. (Citing *Erie R. Co. v. Tompkins, supra*). And admiralty courts, when invoked to protect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state. *So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights*

of the parties under controlling federal law would be protected." (Emphases supplied.)

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(U. S. at p. 249, L. Ed. at pp. 245-246) "The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure."

Seas Shipping Company v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099, involved an action *at law*, brought by a longshoreman in the United States District Court for the Eastern District of Pennsylvania to recover damages resulting from injuries sustained on board defendant's vessel (moored at a dock in Philadelphia) by reason of a defective shackle supporting a boom. Liability was predicated, in part, upon unseaworthiness. Defendant contended, inter alia, that the doctrine of unseaworthiness is peculiar to the admiralty and cannot be applied in a suit brought on the law side of the court. This Court rejected this contention, holding (U. S. at p. 88, L. Ed. at p. 1103): "*It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court.*" (citing, inter alia, Garrett v. Moore-McCormack Co., supra).

In *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 66 L. Ed. 927 (decided under the law as it existed prior to the enactment of the Jones Act, 46 USCA Sec. 688) an injured seaman brought an action in a *state court* for damages resulting from an explosion on defendant's vessel. Certiorari was granted to review affirmance of a judgment for plaintiff by the highest appellate court of the state, defendant's contention being that the trial judge had incorrectly instructed the jury in that he had permitted the jury to find compensatory damages, instead of restricting re-

covery to maintenance and cure and wages. The trial judge had instructed the jury according to the common law rule of negligence and contributory negligence and had neglected to charge on unseaworthiness. The Supreme Court held that under the maritime law plaintiff was entitled to compensatory damages, that the general rules of the maritime law apply *whether the proceeding be instituted in an admiralty or common-law court*, and that since the trial court had not instructed the jury in consonance with these rules, it fell into error. However, in view of the fact that the charge was more favorable to the defendant than he was entitled to demand under the law, the Court refused to disturb the judgment.

In *Robins Dry Dock & Repair Co. v. Dahl*, 266 U. S. 449, 69 L. Ed. 372, plaintiff, a dry dock worker, brought an action in a New York *state court* (under the law as it existed prior to the enactment of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq.) to recover damages for personal injuries against his employer, alleging that he was injured while doing repair work on a vessel in navigable waters, when a plank on which he was standing broke. Liability was predicated upon the negligence of his employer, in that the company failed to furnish a safe place to work, and failed to provide a safe scaffold as required by the Labor Laws of the State of New York. The trial judge had charged the jury, inter alia, that in determining the question of defendant's negligence, they could take into consideration Sec. 18 of the New York Labor Law which defined the duties of employers with respect to scaffolds. Judgment went for the plaintiff, and was affirmed by the State Appellate Court. This Court reversed, holding:

> (U. S. p. 457, L. Ed. p. 374) "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel.
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> " . . . *The rights and liabilities of the parties arose out of and depended upon the general maritime*

law, and could not be enlarged or impaired by the state statute (citing cases). They would not have been different had the accident occurred at San Francisco.

"The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. *No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court.* The error is manifest and material." (Emphases supplied.)

Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 62 L. Ed. 1171 involved a seaman's action for personal injuries, *decided under the general maritime law prior to the advent of the Jones Act, supra* (46 U. S. C. A. Sec. 688). The action was prosecuted at law in the District Court. It was based upon injuries allegedly sustained because of an improvident order of a superior officer, and full indemnity for damages was demanded, no claim being made for maintenance and cure and wages and no attempt being made to base liability on unseaworthiness. The seaman argued for the application of the common law rule of full indemnity while the shipowner contended that the extent of recovery was circumscribed by the maritime rule which (prior to the Jones Act) limited the seaman's right to maintenance and cure and wages, where the injury was sustained through the negligent order of the master or through the negligence of any member of the crew, and not by reason of unseaworthiness. This Court affirmed the judgment in favor of defendant, and, in disposing of the question, quoted with approval from the opinion of the Court of Appeals:

(U. S. pp. 379, 380, L. Ed. pp. 1174, 1175) "The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 Sup. Ct. Rep. 483; and although, be-

cause of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman who had been locked up in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. *So a seaman bringing suit in a common-law court for personal injuries could recover, even if guilty of contributory negligence,* although a shore servant suing in the same court could not." (Emphasis supplied.)

The controlling decisions in this field of law are pervaded by the fundamental policy, deeply imbedded in constitutional considerations, that just as state law is supreme in the field of state-created rights, so is federal law (in this instance the maritime law) supreme in the field of federally-created rights, no matter what forum is called upon to adjudicate them.[7]

(B) The Effect of Contributory Negligence Upon Plaintiff's Maritime Rights Is a Matter of Substance Governed Exclusively by the Maritime Law.

As we will fully develop in a later section of our brief, it is incontrovertibly established in the maritime law that an injured worker's contributory negligence does not bar recovery, but merely goes to mitigation of the damages recoverable. Petitioner contends, nevertheless, that when the right is asserted at law, the common law rule must be applied as a bar. Since there is no "federal general common

7. For a recent exhaustive opinion on the subject, see *Jansson v. Swedish American Line*, 185 F. 2d 212 (C. A. 1—1950).

law" (*Erie R. Co. v. Tompkins, supra,* 304 U. S. 64, 78) petitioner contends for the Pennsylvania common law rule, because the tort was consummated within the territorial waters of that state.

Whether or not petitioner's position is sound reduces itself to the question whether the rule for which it contends is one which may be broadly, although not precisely, characterized as one of "substance" or as one of "procedure". To paraphrase the language of this Court in *Guaranty Trust Co. v. York, supra,* 326 U. S. 99 at p. 109, 89 L. Ed. 2079 at p. 2086: The question is not whether the particular rule contended for is declared a matter of "procedure" in some sense; the question is whether such rule concerns merely the manner and the means by which a right to recover, as recognized in admiralty, is enforced, or whether such rule is a matter of substance in the aspect that alone is relevant to the problem, namely, *does it significantly affect the result of this litigation for the federal court, at law, to disregard a rule of the maritime law that would be controlling in an action upon the same claim by the same parties in the admiralty courts?* [8]

That the rule respecting the effect of contributory negligence is one of substance is hardly open to controversy. In *Central Vermont R. Co. v. White,* 238 U. S. 507, 59 L. Ed. 1433, involving a suit in a state court under the Federal Employers' Liability Act, the trial resulted in a verdict

8. The broad scope of this doctrine is illustrated by the recent decision in *Brown v. Western Railway of Alabama,* 338 U. S. 294, 94 L. Ed. 100, involving an action in a state court under the F. E. L. A., wherein this Court held that a railway employee's federally-created rights may not be defeated by a local rule of practice under which pleadings are required to be construed most strongly against the pleader. See also *Dice v. Akron, C. & Y. R. Co.,* — U. S. —, 96 L. Ed. Adv. Op. 285 (Feb. 4, 1952) where this Court held that the right to a jury trial under the Federal Employers' Liability Act, on the issue of fraud in obtaining a release, is a substantive right which may not be abrogated by local state practice.

and judgment for plaintiff. On writ of error in this Court the defendant contended, inter alia, that the trial court had erred in refusing to charge the jury according to the Vermont rule, under which the plaintiff has the burden of affirmatively proving his freedom from contributory fault. This Court rejected this contention, holding that the question of *burden of proof* as to contributory negligence is a matter of substance, governed exclusively by federal law. A fortiori, the *effect* of contributory negligence upon the plaintiff's maritime causes of action is a matter of substance governed by the maritime law, and not subject to the control of the states. Cf. *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 62 L. Ed. 1167 involving the Mississippi "Prima Facie Act".

Conversely, and consistent with the basic doctrine of dominance of state law in the field of state-created rights, this Court held, in *Palmer v. Hoffman*, 318 U. S. 109, 116, 117, 87 L. Ed. 645, 651, that in a case involving state-created rights, the question of the burden of establishing contributory negligence is one of local law which federal courts in diversity cases *must* apply.

In *Beadle v. Spencer*, 298 U. S. 124, 80 L. Ed. 1082, this Court had before it the question whether in a seaman's action for personal injuries, *brought in a state court*, it was error to refuse to charge that assumption of risk was a defense barring recovery. In answering the question in the negative, the Court said:

> (U. S. pp. 130-131, L. Ed. p. 1085) " . . . the charge in the form requested, so far as applicable to the evidence, and in view of that actually given, amounted to no more than a request to charge that his (the seaman's) negligence was a defense. *Contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under both it is ground only for apportionment of the damages . . .* "

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 83 Ed. 265 involved a *civil action* brought in the district cou for personal injuries sustained by a seaman. The questi for determination, left open in *Beadle v. Spencer, supr* was whether assumption of risk is a complete defense whe the seaman consciously chooses to use an unsafe applian instead of a known safe method of doing his work. T Court again answered the question in the negative, and, arriving at its conclusion, said:

> (U. S. at pp. 431-432, L. Ed. at pp. 270-271) "Any ru of assumption of risk in admiralty, whatever its scop *must be applied in conjunction with the established a miralty doctrine of comparative negligence and in ha mony with it.* Under that doctrine contributory neg gence, however, gross, is not a bar to recovery but on mitigates damages . . .
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> * * *
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> "The common law is consistent in holding th both contributory negligence and assumption of ri are defenses. But other considerations apart, it seer inconsistent, and an impractical refinement, to app the rule for which petitioner contends *in a system law which maintains the comparative negligence rule the fullest extent.*" (Empheses supplied.)

This case is of the utmost significance for it w brought on the *law* side of the district court. Vital to t Court's holding that the rule of assumption of risk mu be applied in harmony with the admiralty doctrine of co parative negligence was the basic premise that this d trine is applicable as well *at law* as in admiralty, i. e., th the "system of law which maintains the comparative neg gence rule to the fullest extent" is equally controlli *whether the action be brought in admiralty or at l* Otherwise no inconsistency could result in the adoption assumption of risk as a complete bar in actions at l brought to enforce maritime rights, and the rationale

which the court rejected the doctrine of assumption of risk could have no possible basis. This case firmly establishes that the admiralty doctrine of comparative negligence must control the result whether the action is brought in admiralty or on the law side of the federal district court.

Tracing the history of this problem through the adjudications in the Second Circuit is exceptionally enlightening, for it points up the difficulties encountered in the uncritical acceptance of the Belden v. Chase doctrine when perpetuated without consideration of the more recent authoritative expressions of this Court.

So far as we have been able to ascertain, the problem, in its more general aspect, first came to the attention of the Second Circuit Court of Appeals in *Chelentis v. Luckenbach S. S. Co.*, 243 F. 536 (1919). That case was an action *at law*, and involved the question whether in such action a seaman injured by reason of a negligent order of his superior officer can recover full indemnity under common law principles, or is restricted to the recovery of maintenance and cure and wages, under the then existing rule of the maritime law. (See *The Osceola*, 189 U. S. 153, 47 L. Ed. 760). The Court held against the application of the common law rule, upon the theory that the seaman's rights must be the same in every court, whether admiralty or common law, and that the only difference between a proceeding in one court or the other relates to procedural aspects. In discussing the seaman's substantive rights, the Court had occasion to observe, albeit by way of dictum, (p. 538) that " . . . a seaman, bringing suit in a common law court for personal injuries, could recover, *even if guilty of contributory negligence*, although a shore servant, suing in the same court, could not," language quoted with approval when the case was affirmed by this Court in 247 U. S. 372, 62 L. Ed. 1171. The dictum of the *Chelentis* case was followed by further dictum in *John A. Roebling's Sons Co. of New York v. Erickson* (C. A. 2—1919), 261 F. 986 (certiorari denied), an action *at law*, wherein the Court pointed out that the sea-

man's contributory negligence, though it does not bar recovery, may be taken into consideration in determining the extent of indemnity which he should receive. *Storgard v. France and Canada S. S. Corp.*, 263 F. 545 and *Cricket S. S. Co. v. Parry*, 263 F. 523 (both decided in 1920) followed. Both involved seamen's claims for personal injuries brought at law before the effective date of the Jones Act. Both applied the rule of comparative negligence by reducing the damages in proportion to the seaman's fault.

The precise question here involved came squarely before the Second Circuit for the first time in *Port of New York Stevedoring Corporation v. Castagna*, 280 F. 618, cert. den., 66 L. Ed. 801 (1922). That case involved an action *at law* by a longshoreman against his employer (under the maritime law as it existed prior to the Jones Act, supra, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 et seq.) for personal injuries sustained during the course of his work. From a verdict and judgment for plaintiff, defendant appealed, contending, inter alia, that error was committed in charging the jury that if plaintiff was guilty of contributory negligence, such negligence merely went to a reduction of damages, and in refusing to charge that contributory negligence bars recovery. The Court of Appeals rejected this contention, stating:

> (p. 624) "The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum. In the case at bar plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. *He entered the common law court with the same right as he would have entered the admiralty court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, and this right of plaintiff sprang into existence because he suffered a maritime tort.*" (Emphasis supplied.)

Thus, the matter stood in the Second Circuit until some six years later (1928). In *Johnson v. United States Shipping Board Emergency Fleet Corporation*, 24 F. (2d) 963 (reversed on other grounds in 280 U. S. 320), involving a longshoreman's action *at law* for personal injuries, the Court, in a quarter-page per curiam opinion and without discussion, rejected its former holding in the *Castagna* case, *supra*, which it now considered as inadvertent dictum, on the authority of *Belden v. Chase, supra, Atlee v. Packet Co., supra*, and *Maleeney v. Standard Shipbuilding Company*, 237 N. Y. 253, 142 N. E. 602. The Court was evidently not aware of the fact that three years earlier (1925) in *Robins Dry Dock and Repair Co. v. Dahl, supra*, 266 U. S. 449, discussed earlier in this brief, this Court had before it the precise problem involved in the *Maleeney* case (i. e., whether the New York Labor Law imposing duties upon employers with respect to scaffolds can be considered by a jury trying a longshoreman's maritime cause of action) and had not only come to a diametrically opposite conclusion, but had consciously rejected the *Maleeney* case, for that case had been cited in the brief filed by the defendant in error in *Robins Dry Dock v. Dahl* (See 69 L. Ed. at p. 373).

Again in 1931, this problem was presented to the Court of Appeals for the Second Circuit, but this time in a somewhat different form, in *In Re Pennsylvania R. Co.*, 48 F. (2d) 559. This case is of considerable interest because it not only discloses the Court's rationale behind its earlier per curiam decision in *Johnson v. Shipping Board, supra*, but also demonstrates that the Court was holding firm to the position there taken with mixed feelings. The question raised and decided was whether the admiralty court, which had obtained jurisdiction over a non-maritime tort only by virtue of limitation of liability proceedings, was bound by the common law rule of contributory negligence, or was free to follow the maritime rule. The Court recognized the rule as well settled that where the wrong occurs in one jurisdic-

tion and action is brought in another, the rule of contributory negligence of the first governs; and that the law of the place where the tort occurs controls the extent of recovery. Nevertheless, on the authority of *Belden v. Chase, supra,* and *Atlee v. Packet Co., supra* (as well as upon the authority of the overruled case of *Maleeny v. Standard Building Corp.,* and its own decision in *Johnson v. U. S. Shipping Board Emergency Fleet Corp.,* both discussed above) the Court felt it was unable to escape the conclusion that *"as between a common-law court and a court of admiralty the question is treated as one of procedure, though in general the law is otherwise"* (48 F. 2d at 566). Consequently, although expressly acknowledging the anomaly, the Court held the maritime rule to be controlling.

At this junction in the consideration of the problem, the Second Circuit was not yet cognizant of the fact that precisely because it was dealing with a state-created right, the application of the maritime rule was necessarily foreclosed. *Western Fuel Co. v. Garcia,* 257 U. S. 233, 66 L. Ed. 210. Persuasive to the Court's thinking was the belief that "there is nothing in the books beyond our own overruled dicta which throws doubt upon Belden v. Chase." (48 F. 2d at 566.) But whatever the status of the law may have been in 1931, the date of that decision, there is now much on the books not merely to throw doubt upon *Belden v. Chase,* but to completely destroy its dictum as well as the cases which had relied upon it. The Court of Appeals for the Second Circuit could not have foreseen, for example, that in *Garrett v. Moore-McCormack Co., supra,* 317 U. S. 239 (1942), the shipowner was to rely heavily upon the *Belden v. Chase* dictum for the proposition that the Pennsylvania rule, rather than the maritime rule, as to burden of proof for setting aside a seaman's release, was controlling and that this Court in rejecting this contention clearly disclosed its conviction that *Belden v. Chase* had completely lost its vitality in the light of the intervening fifty years of judicial history, by declaring in an unanimous opinion

"This Court has (in many cases) declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law. *Belden v. Chase*, 150 U. S. 674, 37 L. Ed. 1218, 14 S. Ct. 269, an 1893 decision which respondent relies upon as establishing a contrary rule,—*has never been thus considered in any of the later cases cited*" (317 U. S. at p. 245). Nor could the Court have been expected to foresee that in the very same case this Court, in discussing the obligation imposed upon law courts to enforce substantive rights arising from admiralty law in conformity with admiralty principles, had referred to a number of decisions exemplifying the rule (See 317 U. S. 239, 244, footnotes 8 and 9) among which is to be found *Port of New York Stevedoring Corp. v. Castagna, supra*, 280 F. 618, the earlier Second Circuit decision which had *affirmed* the principle of the dominance of the maritime law over state law in the field of contributory negligence involving a longshoreman, and had bypassed the later Second Circuit decisions to the contrary in *Johnson v. U. S. Shipping Board Emergency Fleet Corp., supra* and *In Re Pennsylvania R. Co., supra.*

Not until its decision in *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794 (C. A. 2), where the Court, in a *civil action*, rejected the contention that under this Court's ruling in *Caldarola v. Eckert*, 332 U. S. 155, 91 L. Ed. 1968, the local law rather than the maritime doctrine of seaworthiness measured the shipowner's responsibility toward its longshore workers, did the Second Circuit begin to assimilate its thinking to the trend of authoritative decision. Its position was finally consolidated in *W. E. Hedger Transp. Corp. v. United Fruit Co.*, 198 F. 2d 376 (decided after argument but before decision had been reached in the case at bar below) where, in a civil action on a maritime claim for the negligent sinking of plaintiff's barge, the Court unequivocally repudiated its earlier decisions to the contrary, and held that the plaintiff's contributory negligence did not bar recovery according to the course of the common law,

but merely served to mitigate the damage in accordance with the admiralty rule. In doing so, the Court specifically recognized that the doctrine of *Belden v. Chase* had lost its vitality in the light of this Court's decisions in *Garrett v. Moore-McCormack Co., supra, Seas Shipping Co. v. Sieracki, supra,* and *Carlisle Packing Co. v. Sandanger, supra.*[9]

It is submitted that decisions such as those until recently prevailing in the Second Circuit are erroneous. They were fostered by "a particular way of looking at the law which dominated the judicial process long after its inadequacies had been laid bare."[10] The cases from which they attempt to draw their strength have lost their vitality in the intervening sixty years of judicial history. It is not difficult to understand that in 1892 (the date of the decision in *Belden v. Chase, supra*), when the *Swift v. Tyson* doctrine was still in vogue in diversity cases involving state-created rights, this Court should take a consistent view with respect to federally created rights litigated in the state courts. When *Belden v. Chase* was decided, this Court had not yet crystallized nor clarified for itself the full import of the theory of dominance of the maritime law over state law. It was decided in a judicial climate unfamiliar with

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9. Petitioner lays much stress upon the contention (page 43 of its brief) that the Court, in the *Hedger* case, applied the admiralty rule only because the New York Courts would have done so had the litigation been adjudicated in the state courts. This is an erroneous view. The Court specifically applied the maritime rule without regard for state law, merely pointing out, in passing, that the result would be the same even if *Erie R. Co. v. Tompkins, supra,* were thought to be applicable, since New York would look to the admiralty rule to determine the effect of contributory negligence.

10. *Guaranty Trust Co. of New York v. York, supra* (326 U. S. at 101).

For a discussion of the Second Circuit cases see Robinson, Admiralty pp. 859-862.

Benedict on Admiralty, 6th Ed. Vol. 1, pp. 53-55.

the modern concepts of "substance" and "procedure", and long before the doctrine of federally-created rights versus state-created rights had been formulated in its modern aspects. Just as surely and inexorably as the *Swift v. Tyson* doctrine was to be overruled in *Erie R. Co. v. Tompkins, supra,* so too was the doctrine of *Belden v. Chase* to be completely repudiated,[11] for it is inconceivable that a judicial philosophy which recognizes the necessary dominance of state law in the field of state-created rights should fail, ultimately, to accord to the maritime law a corresponding supremacy.

(C) Caldarola v. Eckert, 332 U. S. 155.

Petitioner contends that the doctrine of supremacy of the maritime law is no longer valid when considering the rights of longshore workers; that *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 61 L. Ed. 1086, which invalidated, on the ground of the supremacy and necessary uniformity of the maritime law, the application of the New York Workmen's Compensation Act to a stevedore killed while unloading a vessel upon navigable waters within the territorial jurisdiction of that state, has been gradually watered down by succeeding decisions of this Court; and implies finally, that in *Caldarola v. Eckert, supra,* 332 U. S. 155, 91 L. Ed. 1968, this Court rejected the *Jensen* doctrine altogether. This chain of reasoning involves, first, a basic misconception of the *Jensen* doctrine; second, a complete misunderstanding of the *Caldarola* decision; and finally, a conclusion which does not follow even if petitioner's premises are thought to be valid.

In *Southern Pacific Co. v. Jensen, supra,* the question raised was the state's power to enforce a state-created right for a maritime tort, that is, the right to workmen's compensation under the New York law. The question was

11. Commentators have taken the same view: Robinson, Admiralty, p. 860; 6 N. Y. U. L. R. 15, 30; 64 Harv. L. Rev. 246, 255.

posed in the context of then existing law under which, in the light of the Constitutional grant to the United States of judicial power over "all cases of admiralty and maritime jurisdiction" (Article 3, Sec. 2 of the Constitution), and of Section 9 of the Judiciary Act of 1789 (1 Stat. at L. 76, 77, Chap. 20), by which the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction—saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it", this Court had found it difficult to define with exactness how far the general maritime law may be changed, modified or affected by state legislation. (*Southern Pacific Co. v. Jensen, supra,* U. S. pp. 214-216). Recognizing that this may be done to some extent (state statutory lien for repairs to a vessel in her home port: *The Lottawanna,* 21 Wall. 558, 22 L. Ed. 654; pilotage fees: *Cooley v. Port Wardens,* 12 How. 299, 13 L. Ed. 996; state wrongful death statutes: *American Steamboat Co, v. Chace, supra,* 16 Wall. 531, 21 L. Ed. 371) but equally recognizing limitations on the state's power beyond which it may not go, this Court declared invalid and unconstitutional any exercise of the state's power in the maritime field "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations" (U. S. p. 216). Whether rightly or wrongly, this Court decided that the New York Act did in fact work material prejudice to the maritime law, and interfered with its proper harmony and uniformity. That the decision might well have gone the other way in the light of its earlier decisions in *American Steamboat Co. v. Chace, supra,* 16 Wall. 522 (according to state courts the freedom to enforce a state-created right of action for wrongful death occurring upon navigable waters, in the absence of Congressional action) and *Old Dominion Steamship Co. v. Gilmore, supra,* 207 U. S. 398 (which ac-

corded to admiralty courts the right to respect and enforce such state-created rights) is not here of major significance. What is important to an understanding of the problem at hand is to recognize that the doctrine concerned itself primarily with establishing the boundary beyond which *state power* in the maritime field could not be validly exercised. The question raised was the validity of the power attempted to be exercised *by the courts of New York* over maritime matters via the State Workmen's Compensation Law. *Implicit in the question was the absence of any recognized right accorded by the admiralty to the deceased longshore worker.* The dissenting opinions point up the question. Mr. Justice Pitney, dissenting, considered the question to be a "narrow one" (U. S. p. 239) "Do the Constitution and laws of the United States prevent *a state court of common law* from applying the state statute in an action in personam arising upon navigable waters within the state, there being no Act of Congress applicable to the controversy?" and further, that "the point involves the question of *state power.*" (Emphases supplied.) Clearly in this view no question presenting any supposed controlling effect of state common law *on federal courts administering maritime rights* was involved. Mr. Justice Holmes' dissent (U. S. 218 et seq.) which may be summarized as follows, throws further light upon the narrow question at issue: First: the problem is one involving the *supplementation*, not the *derogation*, of the maritime law; where there is *no inconsistent maritime law*, the states have the power to pass statutes creating rights and imposing liabilities. Second: the question is what are the *state courts* free to do, not whether state law must be accepted by federal courts enforcing maritime rights; and the mere silence of Congress, *absent an inconsistent maritime rule*, does not foreclose the *state courts* from applying the common law or enforcing state statutory law. Third: As to the "specter of lack of uniformity", Mr. Justice Holmes contented himself with referring to *Old Dominion S. S. Co. v. Gilmore, supra.*

Thus it is that the supremacy of *existing maritime rights* over conflicting state law was not the question in the *Jensen* case. This Court, in *Garrett v. Moore-McCormack Co., supra,* reaffirming in an unanimous decision the necessary dominance of admiralty principles in the adjudication of rights arising from admiralty law, has emphasized that disagreement over the constitutional issues of the cases in the *Jensen* line has never extended to this principle (317 U. S. at 245, footnote 10). A fortiori, no aspect of the *Jensen* controversy involves the imposition of state law *upon federal courts administering maritime claims* by permitting the common law contributory negligence rule to override the established admiralty right of apportionment of damages.

Rejection of the *Jensen* doctrine, therefore, merely enlarges the area in which that doctrine has confined the exercise of *state power* in the maritime field; it does not and cannot establish the supremacy of state law over existing maritime law, and certainly does not permit local law to control the federal diversity court in the administration of recognized maritime rights. Neither the *Jensen* line of cases nor this Court's recent decision in *Caldarola v. Eckert, supra,* establish any such proposition. It is only where the right attempted to be enforced is *exclusively of state origin,* that this Court has established the supremacy of state law when administered in federal diversity courts: *Holmberg v. Armbrecht,* 327 U. S. 392, 90 L. Ed. 743.[12]

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12. The question there posed was whether a state statute of limitations would bar the enforcement, in a federal suit in equity, of the statutory liability of a stockholder in a Federal land bank. In holding against the application of the local law and in defining the impact of the *Erie R. Co. v. Tompkins* doctrine upon federal courts, this Court unequivocally restricted its operation to *rights derived solely from a state* and, through Mr. Justice Frankfurter, said:

(327 U.S. 394) "In *Guaranty Trust Co. v. York,* supra, (326 U. S. 99), we ruled that when a state statute bars recovery of a suit in a State court on a State-created

Petitioner's position is tenable only if state power, exercised in the maritime field, is not merely valid but supreme over existing maritime law, for then only can state law compel federal courts exercising jurisdiction over mari-

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right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was 'between citizens of different states' under Art. 3, Sec. 2 of the Constitution . . . We held . . . that a statute of limitations is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the York case we pointed out with almost wearisome reiteration that we were there concerned solely with State-created rights . . . The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress.

. . . . . .

(p. 395) "The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity . . . And so we have the reverse of the situation in Guaranty Trust Co. v. York, supra. *We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State.*" (Emphasis supplied.)

Compare *The Harrisburg, supra,* 119 U. S. 199, 30 L. Ed. 358 and *Western Fuel Co. v. Garcia,* 257 U. S. 233, 66 L. Ed. 210, where this Court held that if courts of admiralty adopt a state wrongful death statute as a rule of right, they must take the right subject to the limitations which have been made a part of its existence. This is consistent with the converse rule, namely, that where a state undertakes to adjudicate a right exclusively of maritime origin, it must do so in conformity with the maritime law: *Garrett v. Moore McCormack Co., supra,* 317 U. S. 239, 249.

time affairs to grant or withhold relief. And while the area in which state power was left free to operate in matters maritime was expanded at the hands of this Court in subsequent decisions, and while it is true that this Court has stated by way of dictum that the *Jensen* case has no vitality beyond its application to state workmen's compensation laws: *Standard Dredging Corp. v. Murphy*, 319 U. S. 306, 309, 87 L. Ed. 1416, 1419-1420,[13] reconsideration of the constitutional implications of the *Jensen* case has never been undertaken. This Court expressly declined to do so in *Davis v. Department of Labor*, 317 U. S. 249, 87 L. Ed. 246 (1942).[14] It is in this context that the decision in *Caldarola v. Eckert, supra*, must be considered.

In *Caldarola* a longshoreman was injured in the course of his employment on board the S. S. "Everagra", then docked in the North River, New York City. The vessel was owned by the United States and managed on its behalf by the defendant as General Agent.[15] Action was brought in the New York state courts. The highest tribunal of that state held that under New York law the relation which the Agents bore to the vessel did not make them responsible to a third person for its condition and dismissed the com-

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13. That this dictum is not entirely accurate, see *Robbins Dry Dock & Repair Co. v. Dahl, supra*, 266 U. S. 449, in which the *Jensen* doctrine was applied to the New York Labor Laws relating to safe scaffolds on board ship. This case has never been questioned or overruled.

14. It was on the very day the *Davis* case was decided that this court laid emphasis on the fact that disagreement over the constitutional issues in the Jensen line of cases has not extended to the necessary dominance of admiralty principles in the adjudication of rights arising from admiralty law. *Garrett v. Moore-McCormack Co., supra* (317 U. S. at 245, footnote 10).

15. The questions involved in the interpretation of the General Agent Service Agreement between the United States and the defendant are not pertinent here and will not be discussed.

plaint. On certiorari this Court was faced with the problem whether, in view of the admitted maritime nature of the tort, the action of the New York Court, based upon New York law, was decisive. In a five to four decision this Court held that it was. The majority, through Mr. Justice Frankfurter, held the view that the authorities are not clear on the question whether Congress, in enacting the "saving to suitors" clause (Section 9 of the Judiciary Act of 1789) recognized that there were common law rights in the states also cognizable in admiralty, or whether it was concerned only with "saving" to the states the power to use their courts, via common law remedies, to vindicate rights derived from the maritime law; but that

> (332 U. S. at 158) "In any event, whether New York is the source of the right or merely affords the means of enforcing it, her determination is decisive that there is no remedy *in its courts* for such a business invitee against one who has no control and possession of premises. Compare Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355, and Testa v. Katt, 330 U. S. 386, ante 967, 67 S. Ct. 810, 172 ALR 225." (Emphasis supplied.)

The quoted language is critical to an understanding of this case: the three words emphasized and the two cases cited by the Court provide, for us, the key to the meaning of the decision. They disclose that the case turned upon considerations completely divorced from the principle of supremacy of the maritime law over state law, and unrelated to any aspect of the *Jensen* doctrine. In the first case, *Douglas v. New York, etc. R. Co.*, 279 U. S. 377, a suit under the Federal Employers' Liability Act was dismissed by a New York State Court under a state statute giving the Court the discretion to decline to entertain such an action in cases involving nonresidents. This Court affirmed, holding that neither the "equal privileges and immunities" clause of the Constitution (Article 4, Section 2) nor the

grant of concurrent jurisdiction to the federal and state courts, embodied in the F. E. L. A., requires a contrary result. As to the first, the Court held that since the New York statute did not discriminate in favor of citizens against noncitizens, Constitutional requirements were satisfied; as to the second, the Court held that in granting concurrent jurisdiction to the courts of the States, the F. E. L. A. did not purport to *require* such courts to entertain suits arising thereunder, or to *force a duty upon such courts, as against an otherwise valid excuse.* In *Testa v. Katt*, 330 U. S. 386, the second case referred to in *Caldarola*, Rhode Island's excuse for refusing to entertain an action for treble damages under the Emergency Price Control Act was held to be invalid, for reasons not here pertinent, and the Rhode Island Court was therefore held to be bound to enforce the federal claim.[16]

It is evident, therefore, that *Caldarola* did not turn on questions of state law versus maritime law at all, but rather on the narrow question of the state's duty to entertain and enforce in its courts a federal claim. In holding as decisive New York's determination "that there is no remedy *in its courts*" for the claim asserted by Caldarola, the Court simply decided that no such duty existed under the circumstances there disclosed. It was in this context that the Court considered it immaterial whether the claimed right was possibly of dual, i. e., both maritime and local, origin.[17]

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16. For recent decisions involving the State's power to deny a litigant access to its courts see *First Nat. Bank v. United Air Lines*, — U. S. — , 96 L. Ed. Adv. Op. 360, and *Hughes v. Fetter*, 341 U. S. 609, 95 L. Ed. 1212. See also, Annotation, 95 L. Ed. 1221.

17. An examination of the New York decision affirmed in *Douglas v. New York etc. R. Co.*, *supra* (reported in 223 App. Div. 782, 227 N. Y. S. 797, aff'd. 248 N. Y. 580) discloses that the trial court had dismissed the action upon defendant's motion to set aside service of the summons and complaint. In effect at that time, though not referred

That the *Jensen* doctrine was not involved is clear. Nor is it to be supposed, should any doubt remain, that this doctrine, which had been the center of the most heated contro-

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to by the New York Courts, was Section 482 of the Civil Practice Act (enacted in 1920) which provides as follows:

> "A final judgment dismissing the complaint before the close of the plaintiff's evidence does not prevent a new action, ***unless it expressly declares that it is rendered upon the merits.*** A dismissal of a complaint or counterclaim at the close of the plaintiff's or defendant's evidence, as the case may be, or a dismissal of a complaint or counterclaim at the close of the whole evidence, is a final determination of the merits of the cause of action between the same parties or their privies for the same cause of action unless the Court shall dismiss without prejudice."

Since the judgment of dismissal was made on a pretrial motion, without any evidence having been introduced, and did not expressly declare that it was rendered upon the merits, its effect, under the first sentence of Section 482, was a dismissal without prejudice, and consequently the judgment of the Court was clearly tantamount to a refusal to entertain the action.

In *Caldarola,* however, the defendants had appealed from a judgment entered on a verdict in favor of plaintiff. The Appellate Division, First Department, reversed, the action of the Court being "judgment reversed with costs to the appellants and the complaint dismissed with costs" (270 App. Div. 563, aff'd 295 N. Y. 463). This being a dismissal at the close of the whole evidence without indicating dismissal "without prejudice", it would appear that under the second sentence of Section 482 the judgment was a final determination of the merits of the cause of action.

Whether this Court, in its disposition of the *Caldarola* case, may have believed that the effect of the judgments in the *Caldarola* and *Douglas* cases, respectively, was, under New York law, the same, or whether it considered the two cases identical in principle though not the same in precise effect, we are of course in no position to determine. What does appear to be inescapable is that *Caldarola* considered itself bound by the same principle which disposed of *Douglas v. New York etc. R. Co., supra,* that is, the right of a state to decline to entertain a federal claim.

versy for some thirty years, and whose constitutional implications this Court has expressly refused to reconsider,[18] should be suddenly swept away, without a single passing reference to it or to the decision which brought it into being.

But much more important than the absence of connection between *Jensen* and *Caldarola* is the crucial fact that a determination of the non-existence of a duty, *on the part of a state court*, to entertain and enforce a maritime claim can under no view be converted into a requirement that a *federal court, called upon to enforce the same claim, must likewise refuse to entertain it. Caldarola* did not so hold, and therefore cannot be relied upon by petitioner in support of the view that the Pennsylvania rule of contributory negligence must control the disposition of the case at bar.

The recent decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, conclusively demonstrates that *even in the absence of a recognized rule in admiralty*, a federal diversity Court exercising jurisdiction in maritime affairs is not bound by state law. There, as here, the action was instituted by a longshoreman against a shipowner as a civil action in the United States District Court claiming damages for injuries sustained while engaged in repairing certain grain fittings on defendant's vessel, then docked at Philadelphia. There, as here, the shipowner filed a third-party complaint against Haenn Ship Ceiling and Refitting Corporation, plaintiff's employer, claiming contribution because of the concurring negligence of the employer. By agreement of all parties before trial, a judgment was rendered for the longshoreman and paid by Halcyon, the shipowner. The case then proceeded to trial on the question of contribution as between Halcyon and Haenn and the jury returned a special verdict finding Haenn 75% and

18. Mr. Justice Frankfurter, the writer of the *Caldarola* Opinion, had fully concurred in this Court's earlier refusal: *Davis v. Department of Labor, supra*, 317 U. S. 249, 258-259.

Halcyon 25% responsible. Although that case was tried *on the civil side of the court and not in admiralty*, the question which this Court posed for itself was the existence and extent of the *admiralty doctrine* of contribution in non-collision cases. Concluding that no such doctrine is recognized in the admiralty, and considering itself free, as a Court "exercising jurisdiction in maritime affairs", to fashion new judicial rules of contribution "if wholly convinced that it would best serve the ends of justice" (U. S. p. 285), this Court nevertheless declined to do so, believing the problem to be more appropriate for Congressional action under the unique circumstances there involved. *In doing so, this Court did not look to the Pennsylvania law to determine what result would hav been reached if the action had been brought in the Pennsylvania Courts, much less did it consider the federal diversity court in any sense bound by the Pennsylvania rule.*[19] We cannot believe that this Court would have overlooked the force of the decision in *Caldarola v. Eckert, supra,* if the rule in that case had required, as petitioner now contends, that a diversity court exercising jurisdiction in maritime affairs is bound to sacrifice the maritime rule in the face of conflicting state law.[20]

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19. For the Pennsylvania rule see Pa. Act of 1939, June 24, P. L. 1075 Sec. 1, 12 Purdon's Pa. Stat. Ann. Sec. 2081; *Maio v. Fahs,* 339 Pa. 180, 14 A. 2d 105. The rule was considered by this Court, in connection with an action under the Federal Tort Claims Act, in *United States v. Yellow Cab Co.,* 340 U. S. 543, 95 L. Ed. 523.

20. A similar conclusion was reached by this Court in *Seas Shipping Co. v. Sieracki, supra,* 388 U. S. 85, which upheld the application of the *admiralty doctrine of seaworthiness* in a longshoreman's action for personal injuries sustained within the territorial waters of Pennsylvania, *brought on the law side of the federal district court* sitting in Pennsylvania. In doing so, this *Court did not look to see whether Pennsylvania law would permit such result had the action been brought in the Pennsylvania courts.* The dissent, by three of the Justices, was not on the point under consideration.

The harsh and archaic common law doctrine of contributory negligence runs counter to every concept of enlightened standards of justice. It has been abolished in some fields by Congressional action and has been repudiated by numerous states.[21] It is utterly repugnant to the equitable doctrine of comparative fault traditionally applied in the admiralty. That Pennsylvania may still adhere to this outmoded concept of justice cannot furnish the occasion for imposing it upon a federal court enforcing a maritime claim. Nothing short of unavoidable necessity should serve as a sufficient reason for adopting it here.

(D) Under the Maritime Law, the Effect of Hawn's Contributory Negligence, Upon the Extent of Damages Recoverable, Is Determined by the Comparative Negligence Rule.

In *The Arizona v. Anelich, supra,* 298 U. S. 110, 80 L. Ed. 1075 (1936), this Court had before it the question whether assumption of risk is a defense to an action brought under the maritime law as modified by the Jones Act (U. S. C. Title 46, Sec. 688) to recover damages for the death of a seaman caused by defective equipment. Since the Jones Act incorporates into the maritime law the Federal Employers' Liability Act (45 U. S. C. Sec. 51 et seq.), the problem was set against the numerous decisions of this Court holding that in suits brought by railroad employees under the F. E. L. A. assumption of risk *is* a defense when the injuries are caused by defective appliances not required by the Federal Safety Appliance Act (See U. S. at p. 119). In resolving this problem against the availability of the defense, this Court held that the new rules of liability brought into the maritime law by the Jones Act derive their strength "altogether from their inclusion in the maritime law" (U. S. p. 119), that since the Jones Act does not,

21. See Mole and Wilson, A Study of comparative Negligence, 17 Cornell Law Quarterly, 333, 608 et seq.

by its own terms, or by those adopted by reference from the F. E. L. A. prescribe that assumption of risk shall be a defense, the scope of the new rules and the nature of the defenses must be ascertained by reference to their new setting in the admiralty system and "are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part" (U. S. p. 123); and that inasmuch as *before the Jones Act contributory negligence was ground for mitigation of damages only,* and no American case appears to have recognized assumption of risk as a defense, the purpose and terms of the Jones Act and *"the nature of the juristic field in which it is to be applied"* (U. S. p. 123) preclude the assumption that Congress intended, by its adoption, to modify the maritime rules by implication.

In *Beadle v. Spencer, supra,* 298 U. S. 124, 80 L. Ed. 1082, decided on the same day, the same approach was adopted in determining whether assumption of risk was available as a defense where the seaman's claim is predicated upon the negligent failure to provide him with a safe place to work. The trial court had refused defendant's requests to charge that assumption of risk is a defense to the action. This Court held that the form of the requested charge was tantamount to a request that the seaman's negligence was a bar to recovery, and that the refusal to so charge was not error, since "Contributory negligence is not a defense to a suit brought either under the Jones Act or *under the maritime law for injuries attributable to negligently defective equipment.*[22] *Under both it is ground only for apportionment of the damages . . .*" (U. S. p. 131).

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22. Since the general maritime law did not permit recovery of indemnity for the negligence of a fellow-servant (*The Osceola,* 189 U. S. 158, 175, 47 L. Ed. 760, 764) the qualifying phrase "injuries attributable to negligently defective equipment" was appropriate and necessary in the context used.

Finally, three years later, in *Socony-Vacuum Oil Co. v. Smith, supra* (1939), 305 U. S. 424, 83 L. Ed. 265, this Court was called upon to determine the question, left open in *Beadle v. Spencer, supra,* and *The Arizona v. Anelich, supra,* whether assumption of risk is a defense where the seaman consciously chooses an unsafe appliance instead of a known safe method of doing the work. This Court again answered the question in the negative, and in arriving at its conclusion said in pertinent part:

> (U. S. pp. 428-429) "Before the Jones Act a seaman was entitled to recover from a vessel or its owners indemnity for injuries due to an unseaworthy vessel or for 'failure to supply and to keep in order the proper appliances appurtenant to the ship.' . . . Contributory negligence, *then as now,* was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, *but was ground only for mitigation of damages.* See The Max Morris, 137 U. S. 1; The Arizona v. Anelich, supra. (298 U. S. 122) and cases cited.
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> (U. S. p. 431) "Any rule of assumption of risk in admiralty, whatever its scope, *must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it.* Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages.
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> . . . . . .
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> (U. S. p. 432) . . . "In either case (that is, whether or not the seaman has a choice of using a safe appliance) the seaman's negligence is a contributing cause of his injury, without which the shipowner would be liable to the full extent of the damage.
>
> "The incongruity and practical embarrassment in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces

> the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems an inconsistent, and an impractical refinement, to apply the rule for which petitioner contends *in a system of law which maintains the comparative negligence rule to the fullest extent.*" (Emphases and parenthetical matter supplied.)

In all of these cases a careful evaluation of the "nature of the juristic field in which the (Jones Act) is to be applied" was the prime consideration in the proper integration of that Act into the maritime law, for the Court considered it vital to interpret the Act in harmony with the established rules of the maritime law. Of controlling importance to this Court, as one of the characteristic attributes of that system, "maintained to the fullest extent", was the admiralty rule of comparative negligence. It is evident, therefore, that this determination was no mere passing remark, as petitioner contends (Petitioner's brief p. 21); it was part of the flesh and blood of these decisions.

Nor did this Court misread the cases upon which it relied, as petitioner contends. Petitioner's case-by-case analysis of these decisions, which exemplified for this Court the evolution of the maritime rule, is a fruitless pursuit, for it discloses nothing more than what is characteristic of the judicial process as a whole, namely, that a doctrine or principle is seldom formulated in its ultimate expression when first propounded, that not infrequently it requires decades of judicial experience, marked by inconsistent and asymmetrical development, before a definitive principle emerges in its ultimate form. We believe it is the high office of this Court, and one of its major tasks under its certiorari jurisdiction, to resolve, to consolidate, and to crystallize divergent and uncertain expressions of principle in the lower federal courts. It is part and parcel of the policy-making powers of this Court. It is this duty

which the Court discharged in *Socony-Vacuum Oil Co. v. Smith, supra,* and its two predecessors, when it synthesized and expressed in its present form the maritime rule of comparative negligence. That rule, *now as before the Jones Act* (*Socony-Vacuum Oil Co. v. Smith, supra,* at U. S. p. 428) furnishes ground for mitigation of damages only, in proportion to the fault of the injured maritime worker. It is an assumption hardly to be indulged that this Court was any less aware of the obvious than is the petitioner here, namely, that the cases which it cited did *not* express the rule in invariant terms. Some fifty years earlier, in *The Max Morris,* 137 U. S. 1, 34 L. Ed. 586 (1890), this Court had before it for the first time the question whether in a longshoreman's suit for damages in admiralty, brought against a shipowner (not his employer) for personal injuries sustained through the negligence of those in charge of the vessel, the libellant's contributory negligence bars recovery. This Court squarely held that it does not, but because of the limited question certified, expressly declined to determine the extent to which contributory negligence would mitigate the damages. It was this question, left open in the *Max Morris,* which was finally resolved in the three cases culminating in *Socony-Vacuum Oil Co. v. Smith, supra.*[23] Since then the comparative negligence rule has consistently been applied by the courts in non-Jones Act personal injury cases: *Guerrini v. United States,* 167 F. 2nd 352; *Badalamenti v. United States,* 67 F. Supp. 575 (modified on other grounds in 160 F. 2nd 422); *Palardy v. United States,* 102 F. Supp. 534 (per Circuit Judge Kalodner); *Kreste v. United States,* 158 F. 2nd 575; *Stokes v. United States,* 144 F. 2nd 82.

Petitioner contends, however, that the comparative negligence rule is by its very concept and definition a rule which necessarily encompasses a comprehensive scheme of

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23. *The Max Morris* was one of the cases considered in *Socony v. Smith* (305 U. S. at 429).

loss distribution among all parties at fault, each being required to bear the burden of loss in accordance with his degree of culpability; that since, under the recent decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra,* 342 U. S. 282, there is no right of contribution in admiralty between joint tort feasors in non-collision cases, the comparative negligence rule cannot apply when, as in the case at bar, Pope & Talbot, the original defendant, is foreclosed from seeking contribution from Haenn Ship Ceiling and Refitting Corp., the third party defendant; and that consequently, the application of the comparative negligence rule as between Hawn and Pope & Talbot, only, is not the application of any recognized maritime rule, but rather the formulation of a new rule unknown to the maritime law, a procedure which is foreclosed by the decision in the *Halcyon* case, *supra.* In this situation, petitioner contends, this Court is relegated to the application of the common law rule of contributory negligence under which Hawn is completely barred from recovery.

We will presently reach the numerous basic fallacies which mark the road by which petitioner seeks to arrive at the result which it hopes to achieve. Underlying them all, however, is the unwarranted fundamental assumption that the comparative negligence rule envisions a comprehensive loss-distribution scheme and that therefore, unless all parties at fault are saddled with a share of the loss, its application is anomalous. There is a total and complete absence of any intimation anywhere, whether in the literature or in the decided cases, which would lend the slightest support whatever to the suggestion, here made for the first time, that the rule of apportionment fashioned by the admiralty courts is, either in its conception or in its evolution, in any sense and to any degree whatever integrated into the rights of contribution which may or may not exist as between joint tort feasors. The contention that under the maritime law the problem of allocation of loss as between plaintiff-employee (Hawn) and defendant-shipowner (Pope & Tal-

bot) is inextricably bound to the problem of allocation as between shipowner and the third party defendant (Haenn) is unprecedented, and finds its first and only expression anywhere, so far as we have been able to ascertain, in the argument petitioner now makes before this Court.[24] It is completely devoid of historical roots. Finding no trace of authority, in the maritime law in support of its position, petitioner goes so far as to advance the contention that the statutory comparative negligence rule formulated by the Federal Employers' Liability Act, 35 Stat. 66, 45 U. S. C. Sec. 53, is in full accord with its view (Petitioner's Brief pp. 22-23). Section 53 provides that in actions brought thereunder against any common carrier by railroad:

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury *in proportion to the amount of negligence attributable to such employee* . . ." (Emphasis supplied.)

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24. In this very litigation the petitioner's position in the Courts below exhibited no traces of this novel doctrine. Defendant-Petitioner's Points for Charge Nos. 9, 10 and 11 (R. 177a-178a) call for the equal division of damages in the event of Hawn's contributory negligence, with no reference to possible concurrent fault on the part of Haenn. Petitioner's post-trial motion for molding the verdict seeks the entry of judgment for one-half the damages specially found by the jury (Paragraph 5 of Motion—186a). So, too, in the Court of Appeals where, as the opinion of that Court clearly discloses (R. 241) petitioner contended for a 50 per cent reduction of the damages. And in the Petition for Rehearing filed in the Court below, petitioner again expressly contended for the equal division rule (R. 262-263). In point of fact, diametrically opposed to its present contention that *even in admiralty* the present case would call for the common law contributory negligence rule, petitioner contended that *"Contributory negligence would not have barred the plaintiff's recovery, had he invoked the Court's admiralty jurisdiction."* (Petition for Rehearing—R. 261.)

The language of the section is so clear and unequivocal that further comment would hardly be necessary were it not for the fact that in attempting to support its view petitioner seizes upon and takes completely out of context (Petitioner's Brief p. 23) a passage appearing in *Norfolk & Western Ry. v. Earnest*, 229 U. S. 114, 122, 57 L. Ed. 1096, 1101, wherein the Court stated the statutory rule in converse terms, that is to say, that the plaintiff recovers to the extent that the *carrier's* negligence contributed to the loss. The Court there was not dealing with a three party situation. Obviously, where only two parties are involved, it is as correct to state the rule in terms of the defendant's negligence as it is in terms of the plaintiff's. As a matter of fact, the Court made very clear, in a passage not quoted by petitioner, the purpose and effect of the rule:

> (U. S. p. 122) ". . . the purpose (is) to abrogate the common law rule *completely exonerating* the carrier from liability in such a case, and to substitute a new rule, *confining exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee.*" (Emphases added.)

By the very terms of the Act rights and liabilities are restricted to the employer-employee relationship. This being so, it is evident that Congress could not have contemplated any loss-distribution scheme beyond that relationship, nor can this Court, in the *Norfolk* case, *supra*, be thought to have spoken beyond the necessary confines of the Act. If the Act were concerned with loss distribution among *all* parties at fault, it would have so provided.[25] But there is not a single word in the Act which would give the

25. Assuming, of course, the Constitutional power to do so. It is at the least extremely doubtful that Congress had the power to extend the plan of loss distribution to persons not connected with interstate carriage, as, for example, to create a right of contribution between an interstate carrier and a jointly negligent local transit company.

slightest substance to this thought. Nor is there a shadow of suggestion in the Act that the concurring negligence of the carrier and a third party has any effect upon the injured employee's rights, or that it alters in the slightest degree the operation of the comparative negligence rule as meticulously defined therein. Congress evidently left the determination of third party rights and liabilities to the States, and was content to formulate the comparative negligence rule unhindered by the consideration of that problem, and without reference to it. If, as petitioner contends, comparative negligence is by concept and definition an all inclusive loss-distribution scheme, what is to be said for the Act of Congress which blithely ignores it?

In addition to the general maritime law, the Federal Employers' Liability Act, and the Jones Act (which incorporates the F. E. L. A. into the maritime law) at least twenty-six states have adopted some form of comparative negligence rule.[26] Out of the mass of litigation produced in these twenty-nine jurisdictions, petitioner has been unable to come forth with a single case which even discusses, much less supports, the petitioner's unique ideas concerning the essential nature of the comparative negligence rule. This overwhelming weight of complete silence is perhaps the most eloquent testimonial to the complete baselessness of petitioner's position.

It is clear, therefore, that the problem of loss distribution as between Hawn and Pope & Talbot is neither limited by, nor entangled with, rights and liabilities as between the latter and Haenn. Petitioner attempts to interweave the two only because without this asserted connection it cannot

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26. We rely for this figure entirely on the material contained in A Study of Comparative Negligence, Mole and Wilson, 17 Cornell Law Quarterly, 604, 608-609 (1932). Since the proposition here discussed was advanced by the petitioner for the first time in its Brief filed three weeks before argument, limitations of time foreclosed any extensive independent survey.

take advantage of its basic contention that under the principle of the *Halcyon* decision, *supra*, this Court is foreclosed from applying any rule other than the common law contributory negligence rule. We will advert to this in greater detail later. In substance and effect the moving force behind petitioner's attempt to formulate, out of thin air, its completely baseless view of the comparative negligence rule is the complaint, repeated over and over again, that although Haenn was also at fault, the *Halcyon* decision leaves petitioner without recourse against Haenn by way of contribution. Passing by the fact that the same counsel who now complain of the *Halcyon* result were responsible in *Halcyon* for urging upon this Court that no right of contribution exists in a case such as this, for present purposes it is important to recognize that petitioner's entire line of argument is bound to a number of basic fallacies, and that the net result of the position here taken reduces itself to a series of absurdities. We will briefly touch upon the more glaring examples:

(a) Presumably under petitioner's position, had the present litigation involved Hawn and Pope & Talbot only, Hawn's contributory negligence could not have barred recovery, since petitioner does not go so far as to challenge this Court's decision in *The Max Morris, supra,* 137 U. S. 1. But simply because Haenn also happened to have been concurrently negligent, this Court is urged not merely to abandon the comparative negligence rule, but to ignore *The Max Morris,* as well, thus relegating Hawn to the common-law contributory negligence rule.

(b) It is only because of the double accident of (1) diversity citizenship as between Pope & Talbot and Haenn, and (2) the availability of Haenn for service of process in the Eastern District of Pennsylvania, that Pope & Talbot was able to join Haenn as a third party defendant in the present litigation. Were it not for this accident Haenn would be out of the case. Under petitioner's view the find-

ing of negligence on the part of Haenn concludes Hawn from recovering altogether, because joint tortfeasorship is thereby established between Pope & Talbot and Haenn, and under these circumstances, petitioner contends, contributory negligence is a bar. But there is respectable authority for the proposition that where the right over is indemnity rather than contribution, then the third party defendant must respond to the defendant [27] and, therefore, under petitioner's present view, the comparative negligence rule can be applied without anomaly.

In this circumstance, how could the issue of contribution versus indemnity have ever been judicially determined if Haenn happened not to have been a party litigant here? Certainly not in a litigation between Hawn and Pope & Talbot only, for Haenn would be vitally interested in the outcome of the issue. Certainly, also, not in a litigation between Pope & Talbot and Haenn only, for Hawn would likewise be vitally interested in the outcome. In brief, under petitioner's view, it is only by sheer accident that Hawn's rights can be adjudicated at all.

(c) Counsel for petitioner repeatedly urges the inequity of requiring Pope & Talbot to bear a loss which is partly attributable to Haenn. But this Court, in the *Halcyon* case, *supra,* was not "wholly convinced that (contribution) would best serve the ends of justice" (342 U. S. at 285). Is petitioner's counsel now seeking to overrule the *Halcyon* decision, which they were but recently instrumental in bringing into being? And would not the result be equally "inequitable" if perchance Hawn had not been negligent,

27. In *Crawford v. Pope & Talbot, Inc.* and *National Boiler Cleaning Company,* — F. 2nd — (C. A. 3, Appeal No. 10,820, decided September 3, 1953) the Court of Appeals held that there is a difference between contribution and indemnity and that the decision in Halcyon bars only the former. Hence, Pope & Talbot, the present petitioner, was there given the right to establish a claim for indemnity against National, the third party defendant.

in which event, petitioner seems satisfied, Pope and Talbot would bear the *entire* loss, though Haenn was partly responsible for producing it?

(d) In *Halcyon, supra,* this Court determined the question of contribution as between shipowner and third-party defendant without reference to the method of loss distribution applied as between the injured longshoreman and the defendant shipowner—there were no facts before this Court to indicate whether the longshoreman had himself been contributorily negligent since by agreement of all parties before trial, a judgment was rendered for the longshoreman and paid by Halcyon How could this Court have entertained the question of contribution if, as petitioner now contends (page 14 et seq. of its brief) the problem of recovery as between longshoreman and shipowner is inextricably bound to the problem of recovery as between shipowner and third-party defendant, and cannot be adequately treated piecemeal?

(e) Under Section 33 of the Longshoremen's and Harborworkers' Act, Title 33 U. S. C. Sec. 933, Congress expressly reserved to the injured longshore worker the right to proceed, against persons other than the employer, for the recovery of damages. Petitioner observes that in reserving third-party actions Congress did not specify the method by which damages were to be ascertained, "nor did it see fit to abolish any of the common-law defenses which the third party might raise" (Petitioner's Brief, p. 15), from which it implies that Congress intended the common law rule of contributory negligence to apply to the case at bar. But Congress, evidently recognized what petitioner chooses to ignore, namely, that there was an established body of *maritime law* governing third-party rights and the method by which damages were to be ascertained. Furthermore, the assumption that contributory negligence was a common-law defense which Congress could have abolished if it would, is valid only if contributory negligence was a defense avail-

able in admiralty, which it assuredly is not. *The Max Morris, supra*, 137 U. S. 1. The query "why were the common law defenses not abolished?" makes sense only if there were common law defenses to be abolished.

(f) Petitioner points out (page 16 of its Brief) that Congress made the employer's fault unimportant in determining the employee's rights under the Harborworkers' Act. From this, it would be supposed, the petitioner should also recognize that Congress made the employer's fault equally unimportant *in determining the employee's third party rights specifically reserved under the Act, for nowhere are the employee's third party rights conditioned upon absence of fault on the part of his employer.* But that is not the conclusion which petitioner would draw. Rather, it is argued that since the employer's fault is unimportant, "the quantum of the employer's fault should (not) be made an ingredient in the formula of recovery." The obvious fallacy of this approach is that while Hawn's *injuries* were attributable, in part, to Haenn's fault, the *amount* of Hawn's recovery is in no sense dependent upon Haenn's fault. It is determined by the extent of Hawn's contributory negligence and nothing else.

(g) To highlight what it believes to be the clash between the rule applied in the Court below and the Congressional plan embodied in Harborworkers' Act, petitioner points out (pages 16-17 of its Brief) that had Pope & Talbot not been at fault in the present case Haenn would have been obliged to bear the entire loss imposed upon it by Congress under the Harborworkers' Act. "Yet," says petitioner "by the fortuitous circumstance that Pope & Talbot combined with Hawn and Haenn to produce Hawn's injuries, Haenn's entire burden is shifted to Pope & Talbot. Is it conceivable that the vagaries of a particular factual situation were intended to work such a drastic change in the obligations which Congress initially imposed upon the employer?" Here again, petitioner chooses to ignore that

part of the Congressional plan which is embodied in Section 33 of the Act (Title 33 U. S. C. Sec. 933). For in addition to reserving the third party rights of the employee, that Section provides that acceptance of compensation under an award *shall operate as an assignment, to the employer,* of the employee's third party rights; that the employer may institute proceedings against such third party for the recovery of damages sustained by the employee, *and that out of the amount so recovered the employer may retain all compensation and benefits paid and furnished under the Act as well as the expenses incurred in such proceedings plus a reasonable attorney's fee. The employer's rights, under this section of the plan, are not conditioned upon his freedom from fault in any sense whatsoever.* In the light of these provisions, how can it be believed that any supposed shifting of the burden from Haenn to Pope & Talbot is in conflict with the Congressional plan?[28] In our opinion these considerations demonstrate as conclusively as the circumstances permit, that Haenn's fault vel non has no bearing whatever either upon Hawn's right and extent of recovery, or upon Pope & Talbot's liability for the entire loss (diminished, of course, by the extent of Hawn's negligence). In brief, Congress has already effectively rejected the substance of petitioner's contentions.

To recapitulate, petitioner's position is that the comparative negligence rule applied below does not accord with the true meaning of that concept since it does not involve an equitable tri-partite rule of loss distribution as between Hawn, Pope & Talbot, and Haenn; that no such equitable

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28. True, there was no assignment in the case at bar because the compensation paid was not under an award. But petitioner's argument does not proceed on the basis of any express provisions of the Act; it proceeds entirely on what is conceived to be the sense and intent of the overall plan, considered in the light of "basic notions in integration." It is on these same terms that our answering argument is here made.

loss distribution rule exists in the admiralty; and that in the absence of such a recognized rule this Court is not free, under its decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., supra,* 342 U. S. 282, to formulate any rule of comparative negligence, just as in *Halcyon* it declined to formulate an admiralty rule of contribution between joint tort feasors; and that consequently, the common law rule of contributory negligence must control the result. We have thus far reviewed the first phases of petitioner's argument, and have pointed out that the problem which petitioner attempts to pose for this Court is not, in fact, presented in the particular straight jacket which petitioner would place upon it, i. e., in terms of an *equitable tri-partite apportionment,* for the simple reason that the comparative negligence rule is *not* a rule of apportionment which necessarily encompasses within its scope all of the parties at fault. What then, is the effect of the *Halcyon* decision upon the ultimate disposition of the case at bar?

In *Halcyon, supra,* this Court held, in substance, that although there is no recognized admiralty rule of contribution between joint tort feasors in non-collision cases, this Court, exercising jurisdiction in maritime affairs, would nevertheless feel free to fashion such rules, if wholly convinced that it would best serve the interests of justice; it concluded however, that it would be less wise to fashion new judicial rules of contribution, than to await Congressional action, in view of the fact that this problem must be integrated with other federal acts such as the Jones Act, The Harborworkers' Act, the Public Vessels Act (46 U. S. C. 781-790), the Limitation of Liability Act (46 U. S. C. Sec. 181 et seq.) and the Harter Act (46 U. S. C. Sec. 190-195), under all of which problems of contribution may arise, and in further view of the fact that many groups of persons with divergent views and interests are vitally concerned with the administration of these Acts as an integrated whole. Under these unique circumstances, this Court said:

(342 U. S. at 286) "We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run."

There is no comparable problem presently before this Court. First of all, whatever effect Hawn's negligence may have upon the *extent* of the damages recoverable, one thing is certain beyond peradventure of doubt, that under universally accepted maritime principles his contributory negligence *cannot bar recovery altogether: The Max Morris, supra; Beadle v. Spencer, supra; The Arizona v. Anelich, supra; Socony-Vacuum Oil Corp. v. Smith, supra.* Secondly, under the holding of this Court in *Halcyon, supra,* Pope & Talbot has no right of contribution as against Haenn. These two vital facts differentiate at the outset the problem involved in *Halcyon* from the problem here presented, for in *Halcyon* the central point from which the problem stemmed —the basic circumstance which gave rise to the problem in the first instance—*was the absence of an available maritime rule to control the result.* Not so here, for maritime rules are readily at hand defining the rights and liabilities of all of the parties.

Nor is there here any real problem of integration with existing Federal acts such as cannot be adequately resolved by the judicial process (were such integration at all necessary). Removing from consideration of the problem the phase relating to contribution (temporarily present only because petitioner has erroneously injected it) all that is actually involved is the effect of Hawn's contributory negligence upon *his* right to recover from Pope & Talbot. The only Federal Act to which this problem may be thought to have any real relation is the Harborworkers' Act which, under Section 33, *supra,* left the maritime rules governing rights and liabilities as between the longshoreman and persons other than the employer exactly where it found them.

This Court considered itself the appropriate tribunal for formulating the rule of divided damages in collision cases. *The Schooner Catherine v. Dickinson*, 58 U. S. 17, 15 L. Ed. 233. Again, in the *Max Morris, supra*, the effect of a longshoreman's contributory negligence was considered appropriate for judicial determination. The Congressional legislation since enacted has not changed these rules. This not only demonstrates that Congress is content to leave such maritime problems in the hands of the judiciary, but also establishes that these problems do not demand *Congressional* integration into existing Acts.

Finally, Congress *cannot* furnish the solution to the present problem. Because, *so long as Hawn's contributory negligence does not bar recovery* (whatever effect it might have on the extent of damages recoverable), *some rule of apportionment must be applied* even if it must now for the first time be formulated. This Court cannot await Congressional action before determining what formula to apply.

This Court, in *The Marianna Flora*, 24 U. S. 11, 6 L. Ed. 405, early observed (per Mr. Justice Story) that:

> "Even in cases of maritime torts independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion upon the subject."

After decades of evolution this basic philosophy finds its ultimate expression in this Court in the cases terminating in *Socony-Vacuum Oil Corp. v. Smith, supra.* We respectfully suggest that none of the considerations advanced by the petitioner foreclose the application of the comparative rule in the case at bar. On the contrary, every consideration calls for determining this case in harmony with the juristic field in which the rights and obligations of the parties originate.

SECOND QUESTION: HAWN'S JUDGMENT MAY NOT BE REDUCED BY THE AMOUNT OF PAYMENTS MADE TO HIM BY HIS EMPLOYER, HAENN.

Petitioner conceives the problem presented here as one of indemnity and poses the question substantially as follows: "Is Haenn entitled to indemnity from Pope & Talbot?" No such question is involved in this case.

The facts are that notwithstanding Hawn's election to recover damages against Pope & Talbot under Section 33 of the Harborworkers' Act,[29] Haenn, the employer, has continued to pay "compensation" at the rate of $25.00 per week. At the time judgment was entered below (September 28, 1951) Haenn had paid "compensation" in the sum of $4,040.00 and medical expenses in the sum of $831.35, or a total of $5,831.35. Since the entry of judgment Haenn has continued to make such payments to Hawn to the limit of its liability under the Act (although this fact is necessarily not of record). Hawn, in his turn, has agreed to repay to his employer all such sums, if and when his judgment against Pope & Talbot is collected.[30]

The simple question before this Cou t is whether there is any justification for striking down the agreement between Hawn and Haenn as being contrary to the provisions of the Harborworkers' Act. That it is not is made evident by an analysis of the provisions which bear on this point.

Under Section 933(a), *supra*, the employee may "elect . . . to receive such compensation or to recover damages against such third person." If the employee elects to pro-

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29. 33 U. S. C. Sec. 933:

"(a) If on account of disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect . . . to receive such compensation or to recover damages against such third person."

30. The facts appear in the Memorandum re Final Judgment—R. 202a.

ceed against a third person, Section 933(f) limits the employer's obligation under the Act to a sum equal to the difference between what the employer would have been required to pay under the Act and the amount recovered against such third person.[31] These two sections taken together make it clear that the employee, upon his election to sue, gives up his right to compensation *until the third-party action is finally adjudicated,* for it is then, and only then, that any determination of a possible excess over the amount recovered from the third party can be made. Thus, Haenn gave up valuable consideration for Hawn's agreement to repay—it continued the payments of "compensation" when there was no obligation to do so under the Act. Furthermore, since the limit of Haenn's obligation to pay compensation under the Act is $7500.00,[32] and the judgment rendered on behalf of Hawn is $29,700.00, there is in fact no excess of compensation payable under the Act over the amount recovered from the third party, so that under the circumstances here disclosed, Haenn was not and would not be at any time liable for the payment of any compensation whatsoever.[33]

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31. Section 933(f):

"If the person entitled to compensation—elects to recover against such third person,—the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

32. See Stipulation recited in the Memorandum re Final Judgment—R. 202a. This was in accordance with the provisions of the Act in force as of the time Hawn was injured—November 16, 1947 (R. 232). By Act of June 24, 1948 the limit was increased to $11,000.00 except in cases of permanent and total disability: Title 33 U. S. C. Sec. 914(m).

33. Unless, of course, Hawn's judgment is not sustained by this Court, in which event the entire question becomes moot.

Haenn gave up other valuable rights. First of all, it had the right to controvert its liability for compensation in the first instance, under Section 914(d). Secondly, had Haenn chosen to force an award and then to obtain assignment of Hawn's claim against Pope & Talbot under Section 933(b), it would have had the right, under Section 922, to seek a review and modification of the award. Thirdly, it would have had the right, under such an assignment, to retain out of the fund recovered from Pope & Talbot, all compensation payments made. 33 U. S. C. Sec. 933(b).

It is clear, therefore, that good and valuable consideration supports Hawn's agreement to repay Haenn, and that as a matter of fact if this agreement should be stricken down, as petitioner now urges, *Haenn would be deprived of recouping sums which it was under no obligation to pay except for this very agreement.* And the beneficiary of this wholly unsupportable scheme would be Pope & Talbot, who seeks to reduce Hawn's judgment by these sums, and thus make it impossible for Hawn to honor his agreement.

There is nothing in the Harborworkers' Act which would support such an inequitable result, or which intimates in the slightest that an agreement of this character is against the policy of the Act. As a matter of fact, the Act specifically covers the subject of invalid agreements, and extends its condemnation to just two types of situations. Neither comprehends the agreement presently under consideration.[34] In this situation, the silence of Congress, beyond those actually covered, is conclusive that no other agreements are outlawed by the Act.

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34. "*Sec. 915. Invalid Agreements.* (a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid. . . .

"(b) No agreement by an employee to waive his rights to compensation under this chapter shall be valid."

Petitioner's contention (Brief, p. 50) that "the result sanctioned by the Court below is doubly inequitable and doubly offensive to *Halcyon*, for it permitted Haenn to secure not only contribution, but full indemnity from its partner in fault, Pope & Talbot" is therefore seen to be completely without foundation. There is neither contribution nor indemnity here involved. Petitioner's view is simply another aspect of the proposition it has advanced under the First Question, namely, that this case must be considered in the light of an overall loss distribution scheme. But it has even less bearing on the present question than before, for all that is really involved here is the repayment of a loan advanced by Haenn to Hawn. That Haenn should be foreclosed from recovering this loan, made under humanitarian circumstances, would be unconscionable.

THIRD QUESTION: WHETHER THE DOCTRINE OF SEAWORTHINESS APPLIES TO HAWN IS A MOOT QUESTION.

This case was tried to a jury, which returned a special verdict in favor of Hawn. The jury specifically found, in answers to interrogatories submitted to them, that (a) the S. S. "John Dickinson" was unseaworthy, and (b) that petitioner Pope & Talbot, Inc., was negligent (R. 180a). The Court of Appeals sustained both findings (R. 232-233, 234), and consequently the judgment below rests upon both *negligence* and unseaworthiness. But the petitioner does not here attack the finding of negligence; it presents no question for review relating to that issue. The judgment below must therefore stand even assuming (though, of course, in no sense conceding) that it is not supportable on the finding of unseaworthiness. In this context the issue of unseaworthiness falls completely out of the case as now presented to this Court and therefore, as we see it, has become moot.

Petitioner suggests, however, that whether the question of unseaworthiness is moot depends upon the answer to the first question presented. Its position is that if this Court should hold that Hawn's contributory negligence does not bar recovery, then the extent to which Pope & Talbot will be required to respond to Hawn will differ if its liability is predicated on negligence as opposed to unseaworthiness. This is an erroneous view. The amount of Hawn's recovery from Pope & Talbot is determined by the extent of *his* contributory negligence and nothing else, as we have fully covered under the First Question. The *basis* upon which liability is being imposed upon Pope & Talbot, whether negligence or unseaworthiness, has no bearing upon this question. Assuming, however, that this Court may not agree with our view, we will briefly consider the question.

In its Petition for Certiorari, Pope & Talbot presented the question as follows (Pp. 6-7 of the Petition):

> "3. Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under Seas Shipping Company v. Sieracki, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings."

Now, however, petitioner is no longer content with a review of the limited question presented. It seeks to overthrow the *Sieracki* doctrine altogether, and this for the sole reason that three of the Justices in that case had dissented, and that "the reasons given in the dissent are just as valid, and just as persuasive today as when first uttered" (Petitioner's Brief, p. 53). No other reason, and no other consideration, is advanced as a justification for overruling the *Sieracki* case. Under the circumstances we do not feel that we are called upon to here justify the *Sieracki* doctrine.

Proceeding to the question presented in the Petition, we submit that the *Sieracki* doctrine fully encompasses a longshore worker in Hawn's status, and for precisely the

same considerations applies equally to Hawn as it did to Sieracki. The *Sieracki* decision did not confine the application of the doctrine solely to those longshore workers who actually handle cargo. Its rationale was upon a much broader footing. Quite understandably, since Sieracki's employer was engaged to unload the vessel there involved, much of the Court's language is cast in terms of "longshoremen engaged in loading vessels." But this circumstance is not to be held as rigidly limiting the boundaries of the doctrine, when the entire rationale of the decision points the other way. As a matter of fact, Sieracki himself was nothing more nor less than a winch operator (U. S. p. 87).

This Court, in considering the historical background of the Harborworkers' Act in *Norton v. Warner Co.*, 321 U. S. 565, 569-570, 88 L. Ed. 931, 936, has pointed out the Congressional recognition of the fact that the class of employees commonly known as longshoremen are those who are "mainly employed in loading, unloading, *refitting* and repairing ships."

Hawn was a hatch foreman engaged by Haenn to make minor alterations to the grain feeders on the "John Dickinson". Actual loading of the vessel had commenced at the time, but was interrupted because the grain feeders first used for loading grain had to be changed to receive a cargo of oats. This meant merely that the corners of the feeders were to be cut out, the center shifting board which was "cribbed" was to be made solid, and wing shifting boards were to be erected (R. 232). There is no doubt that historically, and before the advent of modern specialization, this minor carpentry work was performed by the ship's carpenter with the assistance of the crew. The ship's carpenter is traditionally a member of the complement of the vessel. He has many times played a part in the reported decisions. See, for example, the facts in *Atlantic Transport Co. v. Imbrovek, supra*, 234 U. S. 52 (1913).

Hawn was engaged in preparing the vessel for the imminent receipt of cargo requiring special provision for

loading. In a very real sense he was engaged in the operation of loading the vessel, which had only temporarily been interrupted at the time he was injured. We do not believe that the *Sieracki* doctrine would not have been applicable to the winchman there involved if, instead of actually operating the winch at the time he was injured, he had been engaged in making adjustments to the winch to properly handle cargo about to be brought aboard, or had been engaged in changing the falls to accommodate heavier cargo, or had been covering or uncovering the hatches, or had been performing any one of a number of tasks now regularly performed by longshoremen, but formerly traditionally performed by the crew. Nor do we think that any sensible distinction can be made between Hawn and the longshoremen who, just shortly before the accident, were guiding the grain spout at the top of the feeder. Had Hawn and these longshoremen been engaged as fellow workmen by the same company, could it rationally have been contended that Hawn was any less intimately connected with the loading of cargo, or the service in which the ship was then engaged, than the men who were guiding the spout?

In *Sieracki, supra,* this Court said:

> (U. S. p. 95) "All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through

another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship."

We respectfully submit that the full force of this language, and all of the considerations which persuaded this Court in formulating the doctrine for the benefit of those encompassed within the scope of the *Sieracki* decision, are applicable with equal force to a longshoreman occupying the status of Hawn. Any supposed difference between a maritime worker who actually puts cargo aboard the vessel, and a maritime worker, such as Hawn, who either stores the cargo after its receipt on board, or prepares the vessel while in port for its imminent receipt and proper storage during the actual loading operations, is too tenuous a distinction upon which to hinge the formulation of a maritime rule of liability.

Respectfully submitted,

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